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No. _____

In The

# Supreme Court Of The United States

October Term, 2003

STATE OF CONNECTICUT,
*Petitioner,*

v.

RUSSELL PEELER,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

## STATE OF CONNECTICUT'S PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. DOES THE SIXTH AMENDMENT DEMAND PROOF OF A "COMPELLING NEED" FOR THE TESTIMONY OF DEFENSE COUNSEL BEFORE COUNSEL CAN BE DISQUALIFIED?

II. CAN THE ERRONEOUS DEPRIVATION OF COUNSEL OF CHOICE EVER BE HARMLESS?

## TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... v

OPINION BELOW ..... 1

JURISDICTION ..... 1

RELEVANT CONSTITUTIONAL PROVISIONS ..... 1

STATEMENT OF THE CASE ..... 2

A. The Attempted Murder That Brown Witnessed ..... 3

B. Snead's Murder ..... 3

C. The Events Leading To The Murder Of Leroy Brown And His Mother ..... 4

D. Mastronardi's Disqualification ..... 6

F. The Decision Below ..... 7

REASONS FOR GRANTING THE WRIT ..... 8

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SIXTH AMENDMENT DEMANDS PROOF OF A "COMPELLING NEED" FOR THE TESTIMONY OF DEFENSE COUNSEL BEFORE COUNSEL CAN BE DISQUALIFIED? ..... 8

A. The Connecticut Supreme Court has Joined A Minority Of Jurisdictions Which Require Proof Of A "Compelling Need" Before Finding A Conflict Arising When Defense Counsel Is A Potential Witness ..... 10

B. Requiring A "Compelling Need" For Counsel's Testimony Places Trial Courts In The Constitutional Bind That *Wheat* Sought To Eliminate ..... 13

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE ERRONEOUS DEPRIVATION OF COUNSEL OF CHOICE CAN EVER BE HARMLESS ..... 16

A. This Court Has Expressly Left Open The Issue Of Whether The Erroneous Denial Of Counsel Of Choice Is Prejudicial *Per Se* ..... 16

B. The Circuit Courts Which Have Addressed The Issue Of Whether Prejudice Is Presumed From The Erroneous Deprivation Of Chosen Counsel Have Taken Divergent Approaches ..... 18

C. This Court Should Grant Certiorari To Correct The Widespread Misapprehension That The Deprivation Of Counsel Of Choice Is Structural Error ..... 21

CONCLUSION ..... 26

## TABLE OF AUTHORITIES

**PAGE**

**CASES**

*Anaya v. Colorado*, 764 P. 2d 779 (Co. 1988) ..... 19, 24, 25

*Arguelles v. Utah*, S.Ct. No. 03-6734 ..... 20

*Arizona v. Fulminante*, 499 U.S. 279 (1991) ..... 20, 21, 23

*Birt v. Montgomery,* 725 F.2d 587 (11th Cir.), *cert. denied* 469 U.S. 874 (1984) ..... 23

*Bland v. California Department of Corrections*, 20 F. 3d 1469 (9th Cir.), *cert. denied*, 513 U.S. 947 (1994) ..... 19

*Caplin & Drysdale v. United States*, 491 U.S. 617 (1989) ..... 18, 20, 23

*Chapman v. California*, 386 U.S. 18 (1967) ..... 21

*Ciak v. United States*, 59 F. 3d 296 (2nd Cir. 1995) ..... 11

*Coleman v. Alabama,* 399 U.S. 1 (1970) ..... 21

*Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) ..... 17

*Crandell v. Bunnell*, 144 F. 3d 1213 (9th Cir. 1998) ..... 25

*Cuyler v. Sullivan*, 446 U.S. 33 (1980) ..... 9, 13, 22

*Flanagan v. United States*, 465 U.S. 259 (1984) ..... 16-18

*Fuller v. Diesslin*, 868 F. 2d 604 (3d Cir. 1989) ..... 20

*Gandy v. Alabama*, 569 F. 2d 1318 (5th Cir. 1978) ..... 23

*Geders v. United States*, 425 U.S. 80 (1976) ..... 22

*Gideon v. Wainwright*, 372 U.S. 335 (1963) ..... 22

*Gonzalez v. State*, 63 S.W. 3d 865
(Tex. App. 2001) ..... 11

*Government of the Virgin Islands v. Zepp*,
748 F. 2d 125 (3d Cir. 1989) ..... 14

*Hanna v. State*, 714 N.E. 2d. 1162
(Ind. App. 1999) ..... 12

*Holloway v. Arkansas*, 435 U.S. 475 (1978) ..... 9, 13

*Jones v. Barnes*, 463 U.S. 745 (1983) ..... 22

*Lainfiesta v. Artuz*, 253 F. 3d 151 (2d Cir. 2001),
*cert. denied sub. nom.*
*Lainfiesta v. Greiner*, 535 U.S. 1019 (2002) ..... 19

*Louisiana v. Roberts*, 569 So. 2d 671
(La. Ct. of App., 2d Cir. 1990) ..... 17, 19

*McKaskle v. Wiggins*, 465 U.S. 168 (1984) ..... 22

*Milton v. Wainwright*, 407 U.S. 371 (1972) ..... 21

*Morris v. Slappy*, 461 U.S. 1 (1983) ..... 20, 22

*People v. Harlon*, 54 P. 3d 871 (Colo. 2002) ..... 12

*Phillips v. Warden*, 220 Conn. 112,
595 A. 2d 1356 (1991) ..... 15

*Richardson-Merrell v. Koller*,
472 U.S. 424 (1985) ..... 17

*Rose v. Clark*, 478 U.S. 570 (1986) ..... 21, 24

*Satterwhite v. Texas*, 486 U.S. 249 (1988) ..... 21

*Schell v. Witek*, 218 F. 3d 1017 (9th Cir. 2000) ..... 19

*State v. Arguelles*, 63 P. 3d 731 (Utah 2003) ..... 19, 20

*State v. Ehlers*, 631 N.W. 2d 471 (Neb. 2001) ..... 11, 12

*State v. Peeler*, 265 Conn. 460,
828 A.2d 1216 (2003) ..... *passim*

*State v. Sanders*, 534 S.E. 2d 696 (S.C. 2000) ..... 12

*State v. Taylor*, 574 S.E. 2d 58 (N.C. App. 2002),
*cert. denied*, 579 S.E. 2d 572 (2003) ..... 11

*State v. Vanover*, 559 N.W. 2d 618 (Iowa 1997) ..... 11

*State v. White*, 114 S.W. 3d 469 (Tenn. 2003) ..... 12

*Strickland v. Washington*, 466
U.S. 668 (1984) ..... 24, 25

*Tolliver v. Dallman*, 1995 U.S. App. Lexis 15398 (6th Cir. 1995) ..... 19

*United States v. Anderson*, 319 F. 3d 1218 (9th Cir. 2003) ..... 11, 14

*United States v. Arrington*, 867 F. 2d 122 (2nd Cir. 1989), *cert. denied*, 439 U.S. 817 (1989) ..... 14, 15

*United States v. Childress*, 313 U.S. App. D.C. 133, 58 F. 3d 693 (D.C. Cir. 1995), *cert. denied* 515 U.S. 1098 (1996) ..... 19

*United States v. Cortellesso*, 663 F. 2d 361 (1st Cir. 1981) ..... 12

*United States v. Defazio*, 899 F. 2d 626 (7th Cir. 1990) ..... 11, 15

*United States v. Diozzi*, 807 F. 2d 10 (1st Cir. 1986) ..... 12, 18, 24, 25

*United States v. Fulton*, 5 F. 3d 605 (2nd Cir. 1993) ..... 15

*United States v. Greig*, 967 F. 2d 1018 (5th Cir. 1992) ..... 14

*United States v. Harvey*, 814 F. 2d 905 (4th Cir. 1987) ..... 18

*United States v. Howard*, 115 F. 3d 1151 (4th Cir. 1997) ..... 10

*United States v. Kliti*, 156 F. 3d
150 (2d Cir. 1998) ..... 10, 11, 14

*United States v. Lanoue*, 137 F. 3d
656 (1st Cir. 1998) ..... 12

*United States v. Locascio*, 6 F. 3d ..... 13

*United States v. Mays*, 69 F. 3d
116 (6th Cir. 1995) ..... 13

*United States v. Morrison*, 449 U.S. 361 (1980) ..... 25

*United States v. Panzardi Alvarez*, 816
F. 2d 813 (1st Cir. 1987) ..... 16, 25

*United States v. Rankin*, 779 F. 2d
956 (3rd Cir. 1986) ..... 16, 25

*United States v. Reeves*, 892 F. 2d
1223 (5th Cir. 1990) ..... 11

*United States v. Register*, 182 F. 3d 820
(11th Cir. 1999), *cert. denied*, 530 U.S.
1250 (2000) ..... 11

*United States v. Santos*, 201 F. 3d
953 (7th Cir. 2000) ..... 19, 24

*United States v. Turk*, 870 F. 2d
1304 (7th Cir. 1989) ..... 19

*United States v. Voigt*, 89 F. 3d 1050,
*cert. denied*, 519 U.S. 1047 (3d Cir. 1996) ..... 20

*Wheat v. United States*, 486 U.S. 153 (1988) ..... 8-13, 15, 20, 22

*Wilson v. Mintzes*, 761 F. 2d 275 (6th Cir. 1985) ..... 8, 24, 25

**RULES OF COURT**

Practice Book § 40-41 ..... 4

**CONSTITUTIONAL PROVISIONS**

Fourteenth Amendment to the United States Constitution ..... 1

Sixth Amendment to the United States Constitution ..... *passim*

**MISCELLANEOUS**

28 USC § 1257 (a) ..... 1

Supreme Court Rules 10 ..... 1

## OPINION BELOW

The Connecticut Supreme Court reversed the defendant's convictions for murder, attempted murder and risk of injury to a minor in *State v. Peeler*, 265 Conn. 460, 828 A.2d 1216 (2003). (Hereinafter *State v. Peeler* at A-1).

## JURISDICTION

The decision below was released on August 19, 2003. The Petitioner's motion for reargument and reconsideration *en banc* was denied on September 25, 2003. *Id.* at A36. This Court has jurisdiction over this case pursuant to 28 USC § 1257 (a) and Supreme Court Rules 10 (b) and 10 (c).

## RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the

> United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; now shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

The Respondent, Russell Peeler, practices street justice. His arrogance in this regard prompted him to murder three witnesses who would have testified against him including eight-year-old Leroy Brown, Jr. an eyewitness against him, and his mother Karen Clarke.

The Respondent was able to commit these crimes by abusing his right to counsel of choice. He learned, from information provided through counsel via the discovery process, that Brown had given the police a statement implicating him in the attempted murder and eventual murder of Rudy Snead, his partner in a lucrative cocaine operation. At the time, his retained counsel, Gary Mastronardi, was one of only two people-the Respondent being the other–who could forge a solid link between the discovery process and the Respondent's decision to murder Brown and Clarke. This evidence was relevant to the Respondent's identity and intent. Consequently, the trial court disqualified Mastronardi months before trial because he had firsthand knowledge of events implicating his client in these crimes.

### A. The Attempted Murder That Brown Witnessed

On September 2, 1997, the Respondent attempted to murder Snead, "by shooting at Snead while in his car." *State v. Peeler*, at A5. During the drive-by shooting, two seven year old boys were seated in the backseat of Snead's vehicle, his son, Tyree, and Leroy Brown, Jr. *Id.*

After the shootings, Snead identified the Respondent as the shooter and, as a result, the Respondent was arrested for attempted murder and two counts of risk of injury to a minor. *State v. Peeler,* at A5. Snead and the two children were identified by name in the arrest warrant issued for these crimes and in the substitute information. *Id.* The warrant affidavit stated that Snead had identified the Respondent. It also stated that "'[b]oth children appeared traumatized and were *unwilling to talk about the incident.'* (Emphasis added)." *State v. Peeler*, at A30. (Zarella, J., dissenting). Thus, based on this information, the only "witness" who had actually identified the Respondent as the shooter was Snead.

### B. Snead's Murder

After being arrested for attempting to murder Snead, the Respondent was released on bond. As trial testimony ultimately revealed, he was angry at Snead for giving a statement to the police. Thereafter, on May 29, 1998, the Respondent murdered Snead. *State v. Peeler*, at A5. He was then charged with that crime. T. 2/8/98 at 11; T. 9/21/99 at 8.

After being arrested for the murder of Snead, Respondent discharged his original counsel for the drive-by shooting, and hired Attorney Gary Mastronardi to represent him in both cases. *State v. Peeler*, at A5.

### C. The Events Leading To The Murder Of Leroy Brown And His Mother

In August of 1998, the Respondent learned via discovery that the State could link Snead's murder to the drive-by shooting because he used the same gun, his personal .40 Glock semi-automatic pistol, to commit both crimes. Snead, however, was dead, so the Respondent was unaware of anyone, other than his accomplices, who could link him to the Snead crimes. He did not know that, since Snead's murder, Leroy Brown had provided a statement to police identifying him as the drive-by shooter. *State v. Peeler*, at A31-34.

Because the State had evidence that the Respondent killed Snead to prevent him from testifying, it asked that the Respondent's bond be revoked or, failing that, substantially increased. T. 7/8/98 at 4, 10. The trial court did increase the Respondent's bond. Nevertheless, the Respondent was able to post bond and was released. *Id.*

In an effort to ensure that the Respondent did not discover Brown's cooperation with the police, the State filed a rarely used motion for a protective order, pursuant to Connecticut Practice Book § 40-41. T. 8/12/98 at 3. In response to the State's motion for a protective order, the trial court, *Ronan, J.,:*

> provided Mastronardi with two alternatives: (1) the court would order disclosure of the names and addresses of the State's witnesses to Mastronardi, but would prohibit him from disclosing that information to the defendant; or (2) the court would grant the defendant's discovery motion with the names and addresses redacted. The court assured Mastronardi that,

> prior to trial, he would be able to share the information with the defendant to prepare his defense. Mastronardi advised the court that he knew that there were two minors involved in the drive-by shooting and that he and the defendant already knew their names.[1] On December 9, 1998, the court nevertheless issued an order precluding Mastronardi from disclosing to the defendant the names and addresses of any witnesses who had given statements to the police.

*State v. Peeler*, at A5.

On December 23, 1998, the State disclosed to Mastronardi Brown's eyewitness account of the drive-by shooting as well as his mother's police statement which also implicated the Respondent. *Id.* at A6. Pursuant to the protective order, Mastronardi was permitted to discuss the contents of these statements with his client, but could not identify their authors. *Id.* at A6. However, the substance of the statement revealed that Brown was the author. See A31-34.

On January 7, 1999, Leroy Brown and his mother Karen Clarke were gunned down in their apartment. *Id.* at A6. The Respondent and his brother Adrian Peeler were arrested and charged with two counts of capital felony, and one count of murder. *Id.*

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[1] The Respondent distinguished between people who saw him commit a crime and those who did so and then went to the police. T.9/22/99 at 80-81. (Respondent testifies "They weren't [witnesses] they didn't make a statement against me.")

## D. Mastronardi's Disqualification

Following the murders of Clarke and Brown the Respondent had three sets of charges, resulting from three separate shootings, pending against him. *State v. Peeler*, at A3-4. The Respondent faced an attempted murder charge for the drive-by shooting of Snead, a murder charge for murdering Snead, and two counts of capital felony and one count of murder for the killing of Brown and Clarke. Gary Mastronardi remained as counsel on both Snead cases, while a special public defender represented the Respondent on the Clarke/Brown case. *Id.* at A-5-6.

On June 9, 1999, the State moved to disqualify Mastronardi from representing the Respondent in the two Snead cases. *State v. Peeler*, at A6-7. The State argued that Mastronardi was a witness whose testimony would establish the date the Respondent discovered Brown would indeed testify against him. *Id. at* A7-8. The State also argued that once the Respondent was able to confirm Brown's status as a witness, he began to plan Brown's execution. *Id.* The date and method by which the Respondent confirmed Brown's status as a witness was a crucial and disputed fact that would be contested at trial. T. 6/30/99 at 3. Thus, either the State would call Mastronardi as a witness, or defense counsel would do the same in the double homicide case. *Id. at 3-7.* The State argued further that, in either instance, it would be unfair to force the State to deal with Mastronardi as both defense counsel and an unsworn witness to this crucial exchange of information. *Id.* at 12.

The trial court, *Thim, J.*, granted the State's motion, concluding that "'one of the core issues in the case is. . . [what] knowledge [the Respondent] had about [Leroy] Brown's potential testimony and when and how he obtained that knowledge.'" *State v. Peeler*, at A9.

Shortly thereafter, Special Public Defender Robert Sullivan was appointed to represent the Respondent on the Snead cases which are now before this Court.

For a short time, the Snead cases and the Clarke/Browne homicides were joined for trial. Sullivan, however, filed a motion for a speedy trial in the Snead cases. Because the State was seeking the death penalty in the Clarke/Brown homicides and the defense could not prepare for a capital trial in such a short time, the cases were severed. The Snead cases were tried first.

### F. The Decision Below

Following the Respondent's conviction of murder and attempted murder in the consolidated Snead cases, he appealed to the Connecticut Supreme Court.[2]

On appeal, the Respondent claimed that his Sixth Amendment right to counsel of choice was violated when Mastronardi was disqualified. The Connecticut Supreme Court agreed.

The Connecticut Supreme Court ruled that when the State seeks to disqualify opposing counsel because counsel is a potential prosecution witness, it has the burden of showing "whether counsel's testimony is, in fact, genuinely needed." *State v. Peeler*, at A15-16. After reviewing the "fully prepared record" of the entire trial and the capital felony case, the Court

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[2]In a separate trial, the Respondent was also convicted of two counts of capital felony and one count of murder for the Clarke/Brown homicides. Respondent's appeal in that case is pending before the Connecticut Supreme Court. *State v. Peeler*, at A-5, n.6., S.C.16354/16362. Mastronardi testified in the Clarke/Brown trial. *Id.* at A17-18.

held that the trial court erred when it made its pre-trial decision to disqualify Mastronardi. The Connecticut Court concluded that, because other sources were available to establish the link between the discovery order and the murders "the State never provided the [trial] court with specific information that *only* Mastronardi could supply." (Emphasis in original). *Id.* at A18.[3] Thus, the State's failure to demonstrate "a compelling need for Mastronardi's testimony" prior to trial, meant that disqualifying him violated the Respondent's Sixth Amendment right to counsel of choice. *Id.* at A-19-20.

The Court refused to evaluate whether the Respondent was prejudiced by the trial court's ruling. Instead, it presumed prejudice from the erroneous disqualification of chosen counsel. *Id.* at A17-18. The Respondent was rewarded for his gross abuse of his right to counsel with a new trial. *Id.* at A20.

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SIXTH AMENDMENT DEMANDS PROOF OF A "COMPELLING NEED" FOR THE TESTIMONY OF DEFENSE COUNSEL BEFORE COUNSEL CAN BE DISQUALIFIED

In *Wheat v. United States,* 486 U.S. 153 (1988), the Court reviewed a district court's pre-trial decision to disqualify counsel of choice when the conflict was predicated on joint

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[3]The Connecticut Supreme Court listed the State's other sources for the link between discovery and the Respondent's conclusion that Brown was a witness as: the arrest warrant, the trial records maintained by the court showing the chronology of discovery, and the testimony of the state's attorney that he disclosed the statement on December 23. *State v. Peeler*, at A18.

representation of three co-defendants. This Court ruled that a criminal defendant's right to counsel of choice that is derived from the Sixth Amendment "may be overcome not only by a demonstration of an actual conflict of interest but by a showing of a serious potential for conflict." *Id.* at 164. When *Wheat* was decided, this Court could draw on the wisdom of previous cases which had already established that "multiple representation of criminal defendants engenders special dangers of which a court must be aware," to conclude that a conflict existed that overcame the petitioner's qualified right to counsel of choice. *Wheat v. United States*, 486 U.S. at 160, citing *Holloway v. Arkansas*, 435 U.S. 475 (1978) and *Cuyler v. Sullivan*, 446 U.S. 33 (1980).

Based on this history, the Court ruled that, prior to trial, courts must have broad discretion to disqualify counsel of choice to avoid potential conflicts caused by multiple representation and must have "substantial latitude" to reject a defendant's offer to waive a conflict in order to retain counsel of choice. *Wheat v. United States*, 486 U.S. at 152.

Recently, this Court has noted that conflicts of interest come in a variety of forms that might require different remedies. *Mickens v. Taylor*, 535 U.S. 162, 165 (2002). Left unresolved is whether the discretion to disqualify set forth in *Wheat* applies to other circumstances that could give rise to a conflict of interest.

Specifically, this Court has yet to decide whether there exists the same "special danger" that informed the decision in *Wheat*, when a motion to disqualify arises because counsel of choice is a witness to a material fact relevant to the defendant's guilt. Courts have taken two approaches to this question. A vast majority of federal and state courts have concluded that when counsel of choice is a potential witness the *Wheat* rule of broad discretion applies. Two courts, however, including the Connecticut Supreme Court below, have concluded that, before

a trial court can disqualify a defense attorney who is a witness, the State must prove and the court must find that there is a "compelling need" for counsel's testimony.

This "compelling need" standard substantially reduces a trial court's ability to reconcile two competing Sixth Amendment interests: the qualified right to counsel of choice and the right to conflict-free representation. Such a taut standard contradicts this Court's view that discretion in the area must be broad enough so that two trial court's deciding motions to disqualify based on essentially the same facts could reach different results and be neither right nor wrong. *Wheat v. United States*, 486 U.S. at 164. Indeed, the Connecticut Supreme Court's decision conflicts with the Second Circuit (and virtually every other circuit) in a manner that renders it almost impossible for Connecticut trial courts to ever make the right decision on this issue. This is precisely the constitutional bind this Court sought to avoid in *Wheat v. United States*. 486 U.S. at 161 (Broad discretion provided to prevent trial courts from being "whipsawed' by assertions of error no matter which way they rule.").

### A. The Connecticut Supreme Court Has Joined A Minority of Jurisdictions Which Require Proof Of A "Compelling Need" Before Finding A Conflict Arising When Defense Counsel Is A Potential Witness

Most federal Circuit Courts and some state courts agree that an "actual or serious potential for conflict" of interest exists whenever counsel is a witness to a disputed fact and becomes a potential sworn or unsworn witness and furthermore that this conflict justifies disqualification. *United States v. Kliti*, 156 F. 3d 150 (2d Cir. 1998) ("[W]hen faced with an attorney as a sworn or unsworn witness, the proper recourse is to disqualify the attorney, not to exclude testimony"); *United States v. Howard*,

115 F. 3d 1151, 1155-1157 (4th Cir. 1997) (Defense counsel can be disqualified because he is a witness to a statement relevant to case); *United States v. Reeves*, 892 F. 2d 1223, 1227-1228 (5th Cir. 1990) (*Wheat* applies with greater force when lawyer unsworn witness); *United States v. Defazio*, 899 F. 2d 626, 631 (7th Cir. 1990) ("The justice system has an interest in not having a defense attorney be both an advocate and a witness regarding material issues."); *United States v. Anderson*, 319 F. 3d 1218, 1222 (9th Cir. 2003) (Trial court should disqualify counsel who is likely to be a witness); *State v. Vanover*, 559 N.W. 2d 618 (Iowa 1997) (Conflict established when counsel becomes potential witness); *Gonzalez v. State*, 63 S.W. 3d 865, 879 (Tex. App. 2001) (Conflict sufficient when State had option of calling defense counsel).

Moreover, these courts do not require the State to meet an additional burden of proof or the trial court to make an attendant finding of fact before it can rule that a conflict of interest arises when defense counsel becomes a witness. See, e.g. *United States v. Register*, 182 F.3d 820, 830 (11th Cir. 1999), *cert. denied*, 530 U.S. 1250 (2000) (Language of *Wheat* does not comport with a rule that the government must present evidence of a conflict before the district court can disqualify counsel of choice); *United States v. Kliti*, 156 F. 3d at 154 quoting *Ciak v. United States*, 59 F. 3d 296, 305 (2nd Cir. 1995) ("Standing alone, becoming an unsworn witness is a basis for disqualification"); *State v. Taylor*, 574 S.E. 2d 58, 62 (N.C. App. 2002), *cert. denied*, 579 S.E. 2d 572 (2003) (Finding that attorney is potential witness will be upheld if supported by any competent evidence).

The Connecticut Supreme Court has joined those States which demand a higher burden of proof before a court can disqualify counsel of choice. *State v. Ehlers*, 631 N.W. 2d 471, 481 (Neb. 2001) (Government bears heavy burden of proof that

conflict justifies disqualifying counsel)[4]; *Hanna v. State*, 714 N.E. 2d. 1162, 1165 (Ind. App. 1999) (When government seeks to disqualify counsel it bears the burden of proof); see also *State v. White*, 114 S.W. 3d 469, 476 (Tenn. 2003) (State has burden of proof by preponderance of the evidence that "actual conflict" exists); *People v. Harlon*, 54 P. 3d 871, 877 (Colo. 2002) (Burden on moving party to point to "clear danger that either prejudices client or adversary").[5]

Courts in Connecticut and South Carolina, moreover, require proof, at the pre-trial stage, that testimony from defense counsel is crucial to the State's case. *State v. Peeler*, at A-15 ("compelling need" for defense counsel's testimony); *State v. Sanders*, 534 S.E. 2d 696, 698 (S.C. 2000) (Record must establish that counsel was a "necessary witness" to support

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[4] In *Ehlers*, the Court stated that it applied the *Wheat* factors, but did so while holding the State responsible for proving that the principles set forth in *Wheat* were compromised. *State v. Ehlers*, 631 N.W. 2d at 481.

[5] The First Circuit Court of Appeals appears to have an internal conflict on this issue. In *United States v. Diozzi*, 807 F. 2d 10, 12 (1 st Cir. 1986), a pre-*Wheat* case, the Court held the Government to a heavy burden of proof before disqualifying a defense attorney who was a potential witness. It required the Government to accept various forms of remediation in order to avoid disqualifying counsel of choice. *Id.* (Government should have accepted a stipulation, and redacted references to counsel's knowledge of facts). In yet another pre-*Wheat* case, the Court rejected the "compelling needs" test, which meant that the Government did not have to accept alternatives to counsel's testimony. *United States v. Cortellesso*, 663 F. 2d 361, 363 (1 st Cir. 1981) (Government does not have to accept alternatives that truncate its evidence). Since *Wheat*, the Court has affirmed a case in which defense counsel represented a government witness even when the facts were at the "outer limits" of the court's discretion. *United States v. Lanoue*, 137 F. 3d 656, 663-664 (1st Cir. 1998).

removal).[6] Logically, therefore, in these jurisdictions, neither a conflict of interest nor a serious potential for a conflict arises that justifies disqualification solely because the parties know that counsel is a witness to a disputed fact. The court must wait until the State can prove a "compelling need" for counsel's testimony for the conflict to mature, and only then can the trial court formulate a remedy which includes disqualification.

As it did in *Cuyler* and *Holloway*, this Court should resolve any doubts about whether a conflict of interest arises and the *Wheat* analysis is triggered by the simple fact that defense counsel is a potential witness for or against a defendant.

### B. Requiring A "Compelling Need" For Counsel's Testimony Places Trial Courts In The Constitutional Bind That *Wheat* Sought To Eliminate

Depending on the circumstances of a case, there are several problems that arise when defense counsel is a witness to a disputed fact. For example, if counsel has knowledge of a disputed fact and remains in the case, he becomes an "unsworn witness". *United States v. Locascio*, 6 F. 3d at 933-34. This gives the defendant an unfair advantage *Id.* (As unsworn witness, counsel will bolster interpretation of evidence in a manner that cannot be countered). Although this problem does not "whipsaw" the court because the State is not entitled to post-conviction relief, it implicates the judiciary's independent authority to protect the integrity and the fairness of the proceedings. *Wheat v. United States*, 486 U.S. at 151. The fact

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[6] Although the Court in *United States v. Mays*, 69 F. 3d 116 (6th Cir. 1995) applied *Wheat*, it also declared that it was reviewing the decision to disqualify counsel to determine whether it was "likely" counsel would have to testify.

that Mastronardi was an unsworn witness was reason enough to disqualify him. *United States v. v. Kliti*, 156 F. 3d at 156; *United States v. Anderson*, 319 F. 3d at 1222.

Clearly, if counsel has evidence that will benefit his client he has to either testify, and thus be disqualified, or withhold the beneficial evidence. In the Second Circuit, in the latter case, an attorney so conflicted is ineffective and a defendant is entitled to a new trial. *United States v. Kliti*, 156 F. 3d at 157. Thus, if Mastronardi could diffuse the inference that the Respondent obtained crucial information about Brown and Clarke after December 23, he was obligated to offer it.

Of course, if counsel remains in the case and offers evidence against his client regarding a disputed fact, that too could constitute reversible error. *Government of the Virgin Islands v. Zepp*, 748 F. 2d 125, 138 (3d Cir. 1989) (Permitting counsel to remain in case while stipulating to disputed facts detrimental to client is reversible error).

Yet a more severe conflict arises when counsel becomes privy to the disputed facts while the criminal enterprise is unfolding. Here, for example, the conflict arose because the Respondent placed Mastronardi in a situation where his efforts as defense counsel unwillingly and unwittingly facilitated a capital crime.[7] This situation creates an "actual conflict" of interest. *United States v. Arrington*, 867 F. 2d 122, 128-129 (2nd Cir. 1989), *cert. denied*, 439 U.S. 817 (1989) (Actual conflict exists when counsel implicated in scheme to prevent testimony); *United States v. Greig*, 967 F. 2d 1018, 1021 (5th Cir. 1992) (Actual conflict exists when defense counsel made improper

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[7] When arguing against disqualification, Mastronardi sought to distance himself from any inference that he somehow facilitated the murders of Clarke and Brown. T. 6/30/99 at 2–11. *State v. Peeler*, at A7.

contact with co-defendant in an effort to prevent testimony); *United States v. Defazio,* 899 F. 2d 626, 630 (7th Cir. 1990) (Attorney has a conflict of interest in not having his client claim that he lied based on advice of counsel). Even the risk of such bias is so significant that counsel should be disqualified. *Phillips v. Warden*, 220 Conn. 112, 144, 595 A. 2d 1356, 1373 (1991).

In the Second Circuit, this particular problem is almost irremediable. *United States v. Fulton*, 5 F. 3d 605, 612-613 (2nd Cir. 1993) (Where government witness implicates defense counsel in related crime "no meaningful waiver [of the conflict] can be obtained."); *United States v. Arrington*, 867 F. 2d at 122 ("What could be more of a conflict" than defense counsel who is worried about his own reputation).

Even in Connecticut, the mere possibility that counsel's wrongdoing in a wholly unrelated crime might reflect badly on the defendant or dissuade counsel from zealous representation of his client, constitutes ineffective assistance of counsel that entitles a habeas petitioner to relief. *Phillips v. Warden*, 220 Conn. at 147, 595 A. 2d at 1374.

When these incurable conflicts are placed aside the holding in *Peeler,* that it is *per se* reversible error to disqualify counsel without proof of a "compelling need" for him to actually testify, nothing good can arise from a case in which counsel is a witness to a disputed fact about the actual criminal event. Whereas *Wheat* calls for broad discretion, a Connecticut trial court has no discretion whatsoever because it has no place to maneuver without running afoul of the Sixth Amendment and almost certain reversal.

This Court should grant certiorari to clarify *Wheat's* application to cases in which counsel is a witness to a disputed fact.

## II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE ERRONEOUS DEPRIVATION OF COUNSEL OF CHOICE CAN EVER BE HARMLESS

Assuming the trial court erroneously disqualified defendant's counsel of choice, the issue of prejudice remains. This Court should grant certiorari to decide the issue expressly left open in *Flanagan v. United States*, 465 U.S. 259, 268 (1984): Is the erroneous deprivation of counsel of choice *per se* prejudicial or is it subject to review for harm?

The lack of a definitive answer to this question has led to divergent approaches among the Circuit Courts of Appeal considering it. This Court should grant certiorari to resolve this conflict, and to provide a much needed roadmap to the intersection of Sixth Amendment interests and harmless error.

### A. This Court Has Expressly Left Open The Issue Of Whether The Erroneous Denial Of Counsel Of Choice Is Prejudicial *Per Se*

As indicated *supra*, the *Peeler* majority found the allegedly erroneous denial of counsel of choice *per se* reversible error. *State v. Peeler*, 265 Conn. at A16. The Connecticut Supreme Court mistakenly stated that the issue of whether such error can ever be harmless is "well-settled." *Id.* at A16. It relied principally on *Flanagan v. United States*, 465 U.S. 259, 268 (1984) for this assertion. In so doing, the Connecticut Court misinterpreted *Flanagan*.[8]

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[8]The Connecticut Supreme Court is not alone in its misinterpretation of *Flangan. See United States v. Panzardi Alvarez*, 816 F. 2d 813, 818 (1st Cir. 1987); *United States v. Rankin*, 779 F.2d 956, 960 (3rd Cir. 1986);

The issue before this Court in *Flanagan* was whether an order disqualifying defense counsel in a criminal case is immediately appealable. *Flanagan* considered the question of harm in order to determine whether an order granting disqualification fit within the narrow category of orders affecting rights that will be irretrievably lost in the absence of an immediate appeal. "To fall within the exception, an order must at a minimum satisfy three conditions: It must `conclusively determine the disputed question, ''resolve an important issue completely separate from the merits of the action,' and `be effectively unreviewable on appeal from a final judgment.' *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)." *Richardson-Merrell v. Koller*, 472 U.S. 424, 431 (1985).

*Flanagan* held that orders disqualifying counsel do not satisfy either the second or third *Coopers & Lybrand* condition: "If a showing of prejudice is a prerequisite to reversal, then the ruling is not `completely separate' from the merits because it cannot be assessed until a final judgment has been entered; on the other hand, if a showing of prejudice is not required, then the ruling can be effectively reviewed on appeal of the final judgment." *Richardson-Merrell v. Koller*, 472 U.S. 436-37 citing *Flanagan v. United States,* 465 U.S. at 267-269. *Flanagan* thus determined that "whether or not petitioner's claim requires a showing of prejudice, a disqualification order does not qualify as an immediately appealable collateral order." *Id* at 268-69; *see also Richardson-Merrell v. Koller*, 472 U.S. 424 (1985) (Disqualification orders in civil cases are not immediately appealable).

Thus, *Flanagan* plainly did not decide the issue of prejudice. In fact, as acknowledged in *Richardson-Merrell v. Koller*, *supra*, "this Court has never held that prejudice is a

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*Louisiana v. Roberts*, 569 So. 2d 671, 674 (La. Ct. of App., 2nd Cir. 1990).

prerequisite to reversal of a judgment following erroneous disqualification of counsel in either criminal or civil cases." 472 U.S. at 438.

### B. The Circuit Courts Which Have Addressed The Issue Of Whether Prejudice Is Presumed From The Erroneous Deprivation Of Chosen Counsel Have Taken Divergent Approaches

The issue left open in *Flanagan* has been resolved differently by the various federal Circuit Courts addressing it. Five Circuits have held that prejudice will be presumed from the erroneous denial of counsel of choice. *United States v. Diozzi*, 807 F. 2d at 15-16 (Prejudice is presumed when the trial court erroneously grants the government's motion to disqualify defense counsel, despite First Circuit precedent which considers harm when reviewing denials of continuance to accommodate counsel of choice or denials of requests for substitute counsel); *United States v. Harvey*, 814 F. 2d 905, 926-27 (4th Cir. 1987) (Holding, without analysis, that denial of counsel of choice is *per se* prejudicial)[9]; *Wilson v. Mintzes*, 761 F. 2d 275, 286 (6th Cir. 1985) (The right to counsel of choice is entitled to constitutional protection apart from the objective fairness of the proceeding and

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[9] *United States v. Harvey, supra,* held that the federal drug forfeiture act did not exempt legal fees from its forfeiture requirement. *Id.* at 919. It further held that subjecting attorney's fees to forfeiture violated the Sixth Amendment's qualified right to counsel of choice. *Id.* at 923. The Fourth Circuit reversed *en banc. Sub. nom. In re: forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (1988). A majority of the Fourth Circuit judges agreed with the panel that the Act did not exempt attorneys' fees but found the Act constitutional nevertheless. *Id.* at 642-48. After granting certiorari, this Court affirmed the *en banc* decision. *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617 (1989). Because both this Court and the Fourth Circuit *en banc* found no violation of the right to counsel of choice, neither court revisited the issue of harm.

therefore its arbitrary denial can never be harmless); *Bland v. California Department of Corrections*, 20 F. 3d 1469, 1478-79 (9th Cir.), *cert. denied*, 513 U.S. 947 (1994) *overruled on other grounds*, *Schell v. Witek*, 218 F. 3d 1017, 1025 (9th Cir. 2000) (Holding that because the right to counsel of choice is recognized for its own sake apart from its impact on the fairness of the proceedings, its denial cannot be harmless); *United States v. Childress*, 313 U.S. App. D.C. 133, 58 F. 3d 693 (D.C. Cir. 1995), *cert. denied* 515 U.S. 1098 (1996) (Remanding for a determination of whether chosen counsel would have been willing to reenter the case and if so, ordering a new trial without a showing of prejudice despite the fact that chosen counsel has since died); *see also Louisiana v. Roberts*, 569 So. 2d at 674 (Denial of counsel of choice cannot be harmless); *Anaya v. Colorado*, 764 P. 2d 779, 781-83 (Co. 1988) (Erroneous disqualification of counsel is not subject to harmless error review).

Two Circuits hold that the erroneous denial of counsel of choice is subject to review for harm. *Lainfiesta v. Artuz*, 253 F. 3d 151, 156-158 (2d Cir. 2001), *cert. denied sub. nom. Lainfiesta v. Greiner*, 535 U.S. 1019 (2002) (Holding that the arbitrary refusal to permit one of defendant's counsel to conduct a certain cross examination violated defendant's right to counsel of choice, but finding the error harmless); *United States v. Turk*, 870 F. 2d 1304, 1307-8 (7th Cir. 1989) (Finding no error in the denial of a continuance to obtain counsel of choice where defendant could not show prejudice); *see also United States v. Santos*, 201 F. 3d 953, 958-61 (7th Cir. 2000) (Discussing ways in which the denial of counsel of choice may be remedied short of *per se* reversal); *Tolliver v. Dallman*, 1995 U.S. App. Lexis 15398 (6th Cir. 1995) UNREPORTED, (Extending the harmless error rule to the deprivation of counsel of choice in light of recent United States Supreme Court harmless error cases); see also, *State v. Arguelles*, 63 P. 3d 731, 756 n. 23 (Utah 2003)

(Rejecting argument that erroneous deprivation of counsel of choice is structural error requiring *per se* reversal).[10]

The Third Circuit draws a distinction between the arbitrary denial of counsel of choice and the erroneous but non-arbitrary denial of counsel of choice. It holds that prejudice need not be shown when the denial of counsel of choice is arbitrary, while suggesting that prejudice is a prerequisite to reversal when the denial is erroneous but not arbitrary. *United States v. Voigt*, 89 F. 3d 1050, 1074, *cert. denied*, 519 U.S. 1047 (3d Cir. 1996); *Fuller v. Diesslin*, 868 F. 2d 604, 608-10 (3d Cir. 1989).

Although the majority of courts considering this issue have ruled, as did the Connecticut Supreme Court, that the deprivation of the Sixth Amendment right to counsel of choice is prejudicial *per se*, they have done so without according due consideration to the limited nature of the right to counsel of choice as explained by this Court in *Wheat v. United States*, supra, *Caplin & Drysdale v. United States*, 491 U.S. 617(1989) and *Morris v. Slappy*, 461 U.S. 1 (1983). Further, many of the decisions finding the error *per se* reversible pre-date *Arizona v. Fulminante*, 499 U.S. 279 (1991). Even those decided after *Fulminante*, however, fail to adequately analyze the question of harm according to the framework laid down by that case. Certiorari is therefore warranted to correct the widespread misapprehension that the right to counsel of choice, limited though it may be, is nevertheless among the "basic protections," without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair."

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[10] The recent death of the defendant in *Arguelles* mooted the petition for certiorari filed on his behalf. That petition raised, *inter alia,* the issue of whether the denial of counsel of choice is *per se* prejudicial. *See Arguelles v. Utah*, S.Ct. No. 03-6734.

*Rose v. Clark*, 478 U.S. 570, 577-78 (1986).

### C. This Court Should Grant Certiorari To Correct The Widespread Misapprehension That The Deprivation Of Counsel Of Choice Is Structural Error

Since *Chapman v. California*, 386 U.S. 18 (1967) this Court has recognized that most constitutional errors can be harmless. *Arizona v. Fulminante*, 499 U.S. 279 (1991) categorized those constitutional errors subject to review for harm as "trial errors". That is, they are errors "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [they are] harmless beyond a reasonable doubt." *Id.* at 307-8.

*Fulminante* contrasted this type of error from those recognized as prejudicial *per se*. Such inherently prejudicial errors are characterized as "structural errors", or structural defects in the trial mechanism itself, defying harmless error analysis. *Id.* at 309.

Violations of the Sixth Amendment counsel clause fall into both categories: *see Satterwhite v. Texas*, 486 U.S. 249 (1988) (Applying harmless error analysis to the erroneous admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment counsel clause); *Strickland v. Washington*, 466 U.S. 668 (1984)(Defendant must show prejudice in order to obtain a new trial due to violation of his Sixth Amendment right to effective assistance); *Milton v. Wainwright*, 407 U.S. 371 (1972) (Admission of confession arguably obtained in violation of defendant's right to counsel was harmless beyond a reasonable doubt); *Coleman v. Alabama*, 399 U.S. 1 (1970) (Denial of counsel at a preliminary hearing in

violation of Sixth Amendment right to counsel subject to review for harm) *but see McKaskle v. Wiggins,* 465 U.S. 168 (1984) (Denial of the right to self representation is *per se* reversible): *Geders v. United States*, 425 U.S. 80 (1976) (Reversing without considering harm where defendant was prohibited from consulting with counsel during overnight recess); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Total deprivation of counsel at trial requires reversal). In addition, a certain subspecies of effective assistance violations – the denial of an accused's right to conflict-free representation – is presently the sole member of a third category of harm. Under *Cuyler v. Sullivan*, 466 U.S. at 350, 348 and *Mickens v. Taylor*, 535 U.S. at 174, prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." See *Strickland v. Washington*, 466 U.S. at 692 (Describing actual conflict cases as employing a limited presumption of prejudice).

While it may be tempting to group the deprivation of chosen counsel with *per se* violations such as the total deprivation of counsel; *Gideon v. Wainwright*, 372 U.S. 325 (1963); or the denial of the right to self representation; *McKaskle v. Wiggins*, 465 U.S. 168 (1984); to do so would be to ignore significant differences between the rights to counsel and self representation and the much more limited right to chosen counsel.

"[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. *See Morris v. Slappy*, [461 U.S. 1, 13-14 (1983)]; *Jones v. Barnes*, [463 U.S. 745 (1983)]. "*Wheat v. United States*, 486 U.S. at 159. Moreover,

> "[t]he Sixth Amendment's right to choose one's own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government."

*Id.* at 159 (footnote omitted).

Thus, unlike the right to counsel in general, the right to counsel of choice is not absolute. It must oft-times "bend before countervailing interests involving effective administration of the courts." *Birt v. Montgomery,* 725 F. 2d 587, 593 (11th Cir.), *cert. denied* 469 U.S. 874 (1984); *citing Gandy v. Alabama*, 569 F. 2d 1318, 1323 n. 9 (5th Cir. 1978).

One limitation in particular places the right to counsel of choice on a different plane than that occupied by the rights of representation and self representation: it is not available to indigents. This Court has recognized that "those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts." *Caplin & Drysdale v. United States,* 491 U.S. at 624. The denial of counsel of choice, therefore, cannot be "a structural defect in the constitution of the trial mechanism." *Arizona v. Fulminante*, 499 U.S. at 310. That is, the right to be represented by one's chosen attorney cannot be among the "basic protections" without which "no criminal punishment

may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. at 577-78. To so find would be to create an intolerable dichotomy between the fair trial rights of the affluent and those of the indigent.

Most courts finding *per se* reversible error in this setting do so without considering the uniquely limited nature of this Sixth Amendment right. Instead, they focus on one of three rationales offered to support a presumption of prejudice. One such rationale is that "[p]rejudice will not be provable unless the replacement counsel failed to render effective assistance, an independent constitutional violation, and so the right to the lawyer of one's choice will be empty because unenforceable[.]" *United States v. Santos*, 201 F.3d at 960; see also e.g. *United States v. Diozzi*, 807 F.2d at 16; *Anaya v. Colorado*, 764 P.2d at 783. But, as Judge Posner recognized in writing for the Seventh Circuit in *Santos*,

> "this argument is overstated in at least two respects. First, it will sometimes be possible to prove prejudice even though the replacement lawyer didn't render ineffective assistance. . . . Second, and more important, mandamus is an available remedy when an abuse of discretion by the trial judge cannot effectively be remedied by appealing the final decision[.]"

*Id.* at 960.[11]

Another justification for a *per se* rule is that in some

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[11] As *Santos* predicted, there are instances in which prejudice can be shown short of a finding of ineffective assistance. *See Wilson v. Mintzes*, 761 F.2d at 286-287. (If prejudice is required, defendant succeeded in establishing a prejudicial lapse in counsel's representation).

settings "[p]rejudice . . . is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland v. Washington*, 466 U.S. at 692; *see Anaya v. Colorado*, 764 P. 2d at 782 (Relying on the difficulty of showing prejudice to justify *per se* reversal). This rationale cannot extend to the denial of counsel of choice, however. The presumption of competence attached to replacement counsel; *Strickland v. Washington*, 466 U.S. at 609; means the probabilities run the other way: prejudice becomes immeasurable because it is so *unlikely*. That, of course, is the situation in this case. Russell Peeler was represented at trial by presumptively competent replacement counsel. Further, the defendant has never argued, much less established, that his trial counsel's representation was less able than that anticipated with his original attorney.

In view of the absence of any evidence of prejudice and the presumption of competent replacement counsel, reversing this conviction rewards the defendant with an unwarranted windfall. A *per se* rule such as applied by the Connecticut Supreme Court, reserving the most drastic remedy for those situations where there has been no discernible injury or impact, is not only "odd"; *United States v. Morrison*, 449 U.S. 361, 365 (1980); it is hard to square with an insistence that one burdened with incompetent counsel nevertheless prove prejudice to secure a reversal. *Strickland v. Washington*, 466 U.S. at 687 (Defendant must show that his attorney's deficient performance prejudiced the defense).

Another common justification for *per se* reversal, that the interests at stake transcend the fairness of the trial and are essential to the personal autonomy and dignity of the accused; see *Wilson v. Mintzes*, 761 F. 2d 275, 286 (6th Cir. 1985); *Crandell v. Bunnell*, 144 F. 3d 1213, 1216 (9th Cir. 1998); *United States v. Diozzi*, 807 F. 2d at 16; *United States v. Panzardi Alvarez*, 816 F.2d at 818; *United States v. Rankin*, 779 F. 2d 956,

960-61 (1st Cir. 1986); is again defeated by the indigent's inability to partake in these supposedly transcendent considerations. Further, unlike the situation where a defendant is denied the opportunity to defend himself, an accused who faces trial with his second choice of counsel, or competent counsel appointed by the court, will still be able to control the course of his representation by working with replacement counsel. Unless it can be shown that the loss of a particular attorney has irremediably affected the nature and course of his defense, it must be assumed that competent replacement counsel will respect the defendant's fundamental choices as had original counsel.

Thus, none of the common justifications for a *per se* rule withstand scrutiny. Instead, this Court's recent Sixth Amendment and harmless error jurisprudence suggests that unless the government arbitrarily interferes with an accused's choice of counsel, and such interference results in harm to the defendant, no reversal should result.

## CONCLUSION

The State of Connecticut respectfully asks this Court to grant certiorari to correct the error of the Connecticut Supreme Court, to resolve the differences among the federal circuits and states, and to clarify this area of the law.

Respectfully submitted,

THE STATE OF CONNECTICUT

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December, 2003

No. _____

In The

# Supreme Court Of The United States

October Term, 2003

STATE OF CONNECTICUT,
*Petitioner,*

v.

RUSSELL PEELER,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

## APPENDIX TO STATE OF CONNECTICUT'S PETITION FOR WRIT OF CERTIORARI

**APPENDIX**
**TABLE OF CONTENTS**

**PAGE**

*State v. Russell Peeler*, 265 Conn. 460 (2003) ..... A-1

Court Order on State's Motion for Reconsideration and Reargument En Banc ..... A-36

STATE OF CONNECTICUT V. RUSSELL PEELER
(SC 16380)

Borden, Norcott, Katz, Palmer and Zarella, Js.

*Syllabus*

Convicted, following a jury trial, of the crimes of murder, attempted murder and two counts of risk of injury to a child, the defendant appealed to this court claiming, inter alia, that the trial court improperly had granted the state's motion to disqualify M, the defendant's counsel, in violation of the defendant's right to secure counsel of his choice pursuant to the sixth amendment to the United States constitution. The charges against the defendant arose out of two separate incidents, the first of which was a September, 1997 drive-by shooting in which the defendant attempted to murder S, his partner in a crack cocaine operation, while S was traveling in his automobile with two minor children, B and T. The second incident arose out of the subsequent murder of S in May, 1998. The state moved for a protective order to preclude disclosure to the defense of the identity of certain witnesses, including B and T. Although M informed the court that he knew there were two minor victims involved in the drive-by incident and that he and the defendant knew their names, the court issued an order that allowed M to discuss with the defendant the contents of any statements from witnesses that had been given to the police but precluded M from disclosing to the defendant the names and addresses of those witnesses. Thereafter, the state provided M with a statement that B had given to the police and filed with the court a notice of service of disclosure listing, inter alia, B's statement. Approximately two weeks later, B and his mother were murdered and the defendant was charged with those murders. The state moved to disqualify M from representing the defendant in the two cases involving S

on the ground that the state intended to call M as a witness in the defendant's capital felony trial for the murder of B and his mother. The state claimed that M's testimony that B was to have been a witness in the defendant's trial involving S was the focal point of the state's evidence as to motive in the capital felony case. The trial court granted the motion to disqualify M, concluding that a core issue in the defendant's capital felony case was what knowledge the defendant had about B's potential testimony and when and how the defendant obtained that knowledge. On the defendant's appeal, *held* that because the state failed to demonstrate a compelling need for M's testimony, the trial court improperly disqualified M in violation of the defendant's constitutional right to counsel of his choice, and the appropriate remedy was to order a new trial; when either side in a criminal case seeks to call as a witness either a prosecutor or a defense attorney who is or has been professionally involved in the case, that party must demonstrate that the testimony is necessary and not merely relevant, and that all other available sources of comparably probative evidence have been exhausted, and the state here did not provide the court with specific information that only M could provide, it being undisputed that B's identity as a potential witness was known for nearly one year before his murder because he was identified by name in both the original arrest warrant affidavit and in a second substitute information filed in January, 1998, and the notice of service of disclosure of December 23, 1998, memorialized the release of all of the witnesses' statements to M.

(*One justice dissenting*)

Argued May 21–officially released August 19, 2003

*Procedural History*

Substitute information, in one case, charging the

defendant with one count of the crime of attempted murder and two counts of the crime of risk of injury to a child, and substitute information, in a second case, charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Fairfield, where the cases were consolidated; thereafter, the court, *Ford, J.*, granted the state's motion to disqualify defense counsel, and the matter was tried to the jury before *Ford, J.*, after the court denied the defendant's motion for a mistrial, verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed; new trial.*

*Glenn W. Falk*, special public defender, with whom, on the brief, was *Pintip Hompluem* , law student intern, for the appellant (defendant).

*Harry Weller*, senior assistant state's attorney, with whom, on the brief, were *Jonathan C. Benedict*, state's attorney, and *Joseph Corradino*, assistant state's attorney, for the appellee (state).

*Opinion*

KATZ, J. The defendant, Russell Peeler, appeals, pursuant to General Statutes § 51-199 (b) (3),[1] from the judgment of conviction, following a jury trial, of attempted murder in violation of General Statutes §§ 53a-49 (a)[2] and

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[1]General Statutes § 51-199 (b) provides in relevant part: "The following matters shall be taken directly to the Supreme Court . . . (3) an appeal in any criminal action involving a conviction for a capital felony, class A felony, or other felony, including any persistent offender status, for which the maximum sentence which may be imposed exceeds twenty years . . . ."

[2]General Statutes § 53a-49 (a) provides: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he: (1) Intentionally engages in conduct which

53a-54a (a),[3] two counts of risk of injury to a child in violation of General Statutes (Rev. to 1997) § 53-21 (1),[4] and murder in violation of § 53a-54a (a).[5] In this appeal, the defendant claims that the trial court improperly: (1) granted the state's motion to disqualify the defendant's attorney from representing him in violation of his right to secure counsel of his choice under article first, § 8, of the Connecticut constitution, and the sixth amendment to the United States constitution; (2) nullified the defendant's cross-examination of the state's three main witnesses in violation of his sixth amendment right to confrontation and his due process right to a fair trial under the fourteenth amendment to the United States constitution by questioning the witnesses regarding their cooperation with the federal government on federal drug charges and making comments regarding those witnesses and their federal drug proceedings; and (3) violated the defendant's due process right to a fair trial under the fourteenth amendment to the United States constitution by improperly

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would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

[3]General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person . . . ."

[4]General Statutes (Rev. to 1997) § 53-21 provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony."

[5]The attempted murder and risk of injury charges arose from one incident in 1997, while the murder charge arose from a separate incident in 1998. Pursuant to a motion by the state, the cases were consolidated for trial.

questioning the state's expert witness in connection with the admission of a statement by the victim and by improperly instructing the jury regarding that statement. We agree with the defendant's first claim of trial court impropriety and therefore do not address his remaining claims. Accordingly, we reverse the judgment of the trial court and remand the case for a new trial.

The record discloses the following undisputed facts and procedural history regarding the two cases underlying this appeal. See footnote 5 of this opinion. In the first case, the state alleged that, on September 2, 1997, in the vicinity of 500 Lindley Street in Bridgeport, the defendant had attempted to murder Rudolph Snead, Jr., his partner in a crack cocaine operation, by shooting at Snead while in his car and that the defendant thereby had committed risk of injury to the two minor children, Leroy Brown, Jr., and Tyree Snead, both seven years of age, who were in the backseat of Snead's car during the shooting. All three of the victims were identified by name in the police arrest warrant affidavit dated September 11, 1997, and in the second substitute information filed January 20, 1998. In the second case, the state alleged that on May 29, 1998, while he was free on bond following his arrest for the drive-by shooting in the first case, the defendant, who had covered his face to conceal his identity, murdered Snead at the Boston Avenue Barbershop in Bridgeport. The defendant was represented initially by Frank Riccio in connection with the first case and, thereafter, by Gary Mastronardi, who filed his appearance on July 23, 1998, in connection with both cases.

Following the consolidation of the two cases, on August 11, 1998, the state filed a motion for a protective order to preclude disclosure to the defense of the identity of certain witnesses, including the two minor victims, Brown and Tyree Snead. At the hearing on that motion, held on October 6, 1998, the trial court, *Ronan, J.*, provided Mastronardi with two alternatives: (1) the court would order disclosure of the names

and addresses of the state's witnesses to Mastronardi, but would prohibit him from disclosing that information to the defendant; or (2) the court would grant the defendant's discovery motion with the names and addresses redacted. The court assured Mastronardi that, prior to trial, he would be able to share the information with the defendant to prepare his defense. Mastronardi advised the court that he knew that there were two minors involved in the drive-by shooting and that he and the defendant already knew their names. On December 9, 1998, the court nevertheless issued an order precluding Mastronardi from disclosing to the defendant the names and addresses of any witnesses who had given statements to the police. Pursuant to that court order, on or about December 23, 1998, senior assistant state's attorney C. Robert Satti, Jr., provided Mastronardi with the statement by Brown regarding the drive-by shooting and filed with the clerk of the court notice of service of disclosure with an attached supplemental disclosure listing, inter alia, the statement given by Brown.

Tragically, on January 7, 1999, Brown and his mother, Karen Clarke, were brutally murdered in their apartment on Earl Avenue in Bridgeport, where they recently had moved. The state thereafter charged the defendant and his brother, Adrian Peeler, in a third case with those murders, and John Walkley filed an appearance as a special public defender for the defendant in connection with the Brown and Clarke murders.[6]

On June 9, 1999, the state moved to disqualify

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[6]The defendant was convicted of two counts of capital felony for the murders of Clarke and Brown and, after a penalty hearing, was sentenced to life without the possibility of release. *State v. Peeler*, Superior Court, judicial district of Fairfield, Docket No. FBTCR990148396T (June 30, 2000). The defendant's appeal from that judgment and the state's appeal from the sentencing proceeding currently are pending in this court. *State v. Peeler*, Docket Nos. SC 16354/SC 16362.

Mastronardi from representing the defendant in the two cases involving Snead on the ground that the state intended to call Mastronardi as a witness in the defendant's capital felony case for the murder of Brown and Clarke. Specifically, the motion provided that "[i]t is expected that Attorney Mastronardi will be called as a witness in the [capital felony case] regarding any knowledge on his part regarding the address and location of Karen Clarke and Leroy Brown, Jr. Attorney Mastronardi has spoken to the press and to Judge Ronan regarding a [s]tate's [o]bjection to disclosure of the above [witnesses'] address and statements claiming that he or his client had knowledge of their address before the [s]tate's [m]otion [for a protective order]."

On June 30, 1999, the trial court, *Thim, J.*, held a hearing regarding the state's motion to disqualify Mastronardi. Responding to the motion, Mastronardi contended that the state lacked any ground on which to disqualify him. He advised the court that "Mr. Satti, who is the prosecutor who's handling [the capital felony] case, knows full well that I never had the Earl Avenue address. And I assume that he's told this to [state's attorney Jonathan Benedict]. I've said it ad nauseam since the day this happened. I never had the Earl Avenue address. I never knew where these two people lived. And Mr. Satti's words to me in court one day were: In light of all this, aren't you glad that the state never gave you the Earl Avenue address? Now I don't understand why Mr. Benedict would get up and even suggest something like that in open court on the record when he knows that that's not true. His office never gave the Earl Avenue address to me and I never had it. I never knew that these people lived on Earl Avenue until I read it in the newspaper and that is an established fact. That's not--Mr. Satti could be called as a witness to establish that. Do we disqualify the state's attorney's office in this case?"

Rather than pursue the claim in its motion that

Mastronardi had given the defendant the victims' Earl Avenue address, at the hearing the state contended: "So it's not so much evidence that the state would seek to offer as to the defendant's knowing where they live, but rather what is necessary and most relevant in the double homicide trial is the confirmation that Leroy Brown would indeed be a witness. That in fact is the focal point of the state's evidence as to motive in the double homicide. I'd submit that the argument that the December [1998] disclosure triggered the January [1999] murders is most compelling and that therefore Mr. Mastronardi's testimony in the trial of the double homicide will be most necessary and will not be uncontested."

Mastronardi made several points in response. First, in light of the fact that the state was seeking to deprive the defendant of his constitutional right to counsel of his choice, Mastronardi contended that the state was required to provide him with specific questions it intended to ask and then to establish that it could not get the information it sought from any other source. Second, Mastronardi disputed the claim that the state needed his testimony to establish the fact that Brown's statement had been disclosed to him pursuant to the December 9, 1998 discovery order. Indeed, Mastronardi pointed out that it was undisputed and a matter of public record that a copy of Brown's statement had been turned over to him on December 22, 1998, pursuant to the discovery order. Finally, Mastronardi cautioned that when and how the defendant had gained certain information would, in all likelihood, be privileged and therefore outside the reach of the state's questions in any event.

Finally, in response the state contended that Mastronardi "suggests that . . . perhaps the state can develop the information it wants to develop through some other avenue. That may well be. I don't know that it is in fact true at this time. But that does not mean the state would then be restricted and deprived of giving Mr. Mastronardi's evidence as well. I think [what] the

state seeks to produce with Mr. Mastronardi is already fairly clear from my opening remarks and they all relate, essentially, to what happened in December [of 1998] with notification that . . . Brown was in fact to be a witness." The trial court then granted the state's motion to disqualify Mastronardi, concluding that "one of the core issues in the case is . . . [what] knowledge [the defendant] had about Brown's potential testimony and when and how he obtained that knowledge."

Shortly thereafter, the defendant, through his newly appointed special public defender, Robert Sullivan, filed an opposition to the state's request for a protective order to contest the state's further attempts to withhold witness identities and statements. In support of his motion, the defendant referenced statements made by Mastronardi at the hearing on the protective order held on October 6, 1998, specifically, that Mastronardi had informed the court that the defense already was aware of the identities of the minors and that at least one, if not both, had given the state sworn statements. The defendant also cited an article from the Hartford Courant's Sunday Northeast magazine, dated June 13, 1999, in which Benedict conceded that the court order of December 9, 1998, allowing the defendant's attorney to share with the defendant the contents of the statements, did not result in the identity of the witnesses being revealed to the defense. Specifically, Benedict was quoted in that interview as stating: "One thing you've got to understand . . . everybody knew everybody. . . . [T]he defense knew their identities even before coming to court." The state presented no evidence at the hearing to contradict that statement.

On August 6, 1999, the trial court granted the state's motion to continue the protective orders and ordered that the state did not have to disclose the subject material until after jury selection had commenced. Additionally, the court, pursuant to a motion by the state, consolidated all of the cases against the

defendant with the case against his brother, Adrian Peeler, in connection with the Brown and Clarke homicides. Later, the trial court, *Ford, J.*, granted the defendant's motion to sever the cases against him involving Snead from the capital felony cases against the defendant and his brother involving Brown and Clarke.

Following a jury trial, the defendant was convicted of all four charges in connection with the Snead cases and sentenced to a total effective sentence of 105 years incarceration after the sentence enhancement pursuant to General Statutes § 53-202k was imposed. Thereafter, the defendant was tried for the Brown and Clarke homicides. See footnote 6 of this opinion. During that capital felony trial, the state presented Satti as a witness to testify as to the specifics of the December 9, 1998 discovery order.[7] Satti testified that, pursuant to that order, he was to turn over witness statements to Mastronardi, who then was permitted to discuss with the defendant the contents of those statements but not to disclose the names of the witnesses who had provided the statements. Mastronardi also related the terms of the trial court's discovery order, confirming that he was permitted to discuss the contents of the statements with the defendant, but not to disclose the identity of the authors of two of the statements. The state never questioned Mastronardi about what, if anything, he in fact

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[7]The questions that the state actually asked Satti and Mastronardi relating to the discovery when given the opportunity are relevant to our resolution of the issue because "a disqualification order, though final, is not independent of the issues to be tried. Its validity cannot be adequately reviewed until trial is complete. The effect of the disqualification on the defense, and hence whether the asserted right has been violated, cannot be fairly assessed until the substance of the prosecution's and defendant's cases is known. In this respect the right claimed by [the] petitioners is analogous to the speedy trial right." *Flanagan v. United States*, 465 U.S. 259, 268-69, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984); see id., 269 (holding that "a disqualification order does not qualify as an immediately appealable collateral order in a straight-forward application of the necessary conditions laid down in prior cases").

had done in connection with the statements pursuant to the court order. Rather, the state questioned Mastronardi about whether, in his career of practicing law, he ever had violated a court order, to which he responded in the negative.

On appeal, the defendant claims that, in the absence of a compelling need for Mastronardi's testimony at the trial involving the Brown and Clarke homicides, the trial court improperly granted the state's motion to disqualify Mastronardi in the Snead cases. The defendant contends that he was denied his constitutional right to counsel of choice under the state and federal constitutions because the state did not demonstrate a compelling need for Mastronardi's testimony.

The state contends in response that Mastronardi's testimony was necessary to help prove the identity of the defendant and the intent needed to establish the defendant's role in the murders, specifically, "that the December 22, 1998 disclosure was a catalyst in the double homicide [of Brown and Clarke]." The state reasons that the defendant did not consider Brown to be a witness until he learned that Brown had given a statement against him. Therefore, the state contends that Mastronardi "was prohibited from revealing to the defendant the names of any witnesses . . . [and that] [o]nly Mastronardi could testify that he scrupulously complied with that [discovery] order."

We agree with the defendant that the record did not demonstrate that the state had met its burden of proving that Mastronardi's testimony was necessary.[8] Accordingly, we

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[8]The defendant claims that, in deciding whether to disqualify Mastronardi, the trial court should have considered representations by counsel that no conflict existed; see *State v. Drakeford*, 261 Conn. 420, 429, 802 A.2d 844 (2002); and whether a stipulation regarding specific facts would have

conclude that the trial court improperly disqualified Mastronardi in violation of the defendant's constitutional right to counsel of his choice.[9]

We begin with a discussion of the pertinent legal principles that guide our resolution of this issue. It is well settled that the guarantee of assistance of counsel under the sixth amendment to the United States constitution encompasses the right to select one's own attorney. "It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932). Statements on this subject stem largely from an appreciation that a primary purpose of the sixth amendment is to grant a criminal defendant effective control over the conduct of his defense. See *United States v. Nichols*, 841 F.2d 1485, 1502 (10th Cir. 1988); *Wilson v. Mintzes*, 761 F.2d 275, 279 n.5 (6th Cir. 1985). As the United States Supreme Court has stated, the sixth amendment "grants to the accused personally the right to

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been a proper solution to the state's dilemma. See *State v. Crespo*, 246 Conn. 665, 696-97, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999). Because we conclude that the state did not demonstrate that Mastronardi's testimony was necessary, we need not address these claims.

[9]The defendant claims that he is entitled to greater protections in this regard under the Connecticut constitution than under the United States constitution. The state contends that, in *State v. Webb*, 238 Conn. 389, 413-14 n.23, 680 A.2d 147 (1996), this court rejected the contention that the state constitution affords more extensive rights to counsel than does the federal constitution in the context of conflict free representation. The court in *Webb*, however, limited its review to the federal constitutional claim because the defendant did not present an independent and separate state constitutional analysis. See *State v. Vega*, 259 Conn. 374, 384 n.15, 788 A.2d 1221, cert. denied, U.S. , 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002) (independent state analysis required). In light of our conclusion that the defendant is entitled to relief under the federal constitution, we need not decide whether the state constitution affords greater protection in this regard.

make his defense . . . [because] it is he who suffers the consequences if the defense fails." *Faretta v. California*, 422 U.S. 806, 819-20, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

A critical aspect of making a defense is choosing the person who serves as one's assistant and representative. "The right to retain private counsel serves to foster the trust between attorney and client that is necessary for the attorney to be a truly effective advocate. . . . Not only are decisions crucial to the defendant's liberty placed in counsel's hands . . . but the defendant's perception of the fairness of the process, and his willingness to acquiesce in its results, depend upon his confidence in his counsel's dedication, loyalty, and ability. . . .

"The right to retain private counsel also serves to assure some modicum of equality between the Government and those it chooses to prosecute. . . . The right to privately chosen and compensated counsel also serves broader institutional interests. The virtual socialization of criminal defense work in this country that would be the result of a widespread abandonment of the right to retain chosen counsel . . . too readily would standardize the provision of criminal- defense services and diminish defense counsel's independence. There is a place in our system of criminal justice for the maverick and the risk taker and for approaches that might not fit into the structured environment of a public defender's office, or that might displease a judge whose preference for nonconfrontational styles of advocacy might influence the judge's appointment decisions. . . . There is also a place for the employment of specialized defense counsel for technical and complex cases . . . . The choice of counsel is the primary means for the defendant to establish the kind of defense he will put forward. . . . Only a healthy, independent defense bar can be expected to meet the demands of the varied circumstances faced by criminal defendants, and assure that the interests of the individual defendant are not unduly subordinat[ed] . . . to the

needs of the system. . . .

"In sum, our chosen system of criminal justice is built upon a truly equal and adversarial presentation of the case, and upon the trust that can exist only when counsel is independent of the Government. Without the right, reasonably exercised, to counsel of choice, the effectiveness of that system is imperiled." (Citations omitted; internal quotation marks omitted.) *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 645-48, 109 S. Ct. 2646, 105 L. Ed. 2d 528, 109 S. Ct. 2667 (1989) (Blackmun, J., dissenting).

"Indeed, it has been said that the most important decision a defendant makes in shaping his defense is his selection of an attorney. . . . A defendant learns about the charges against him, the weaknesses of the government's case, and possible strategies through an attorney. . . . A defendant also allocates authority to make important decisions, some affecting constitutional rights, to an attorney. . . .

"A defendant, then, must have confidence in the attorney who will represent him or her. For the basic trust between counsel and client . . . is a cornerstone of the adversary system. . . . If all attorneys were the same, the choice of an attorney would be of no moment. However, [a]ttorneys are not fungible. . . . Attorneys are different, and their differences can influence the defense presented by a defendant. Therefore, a defendant is afforded an opportunity to select an attorney." (Citations omitted; internal quotation marks omitted.) *United States v. Nichols*, supra, 841 F.2d 1502.

We recognize, however, that the right to counsel of choice is not absolute. *United States v. Richardson*, 894 F.2d 492, 496 (1st Cir. 1990); *United States v. Friedman*, 270 U.S. App. D.C. 359, 849 F.2d 1488, 1490 (D.C. Cir. 1988); *Burger &*

*Burger, Inc. v. Murren*, 202 Conn. 660, 668, 522 A.2d 812 (1987). When a defendant's selection of counsel seriously endangers the prospect of a fair trial, a trial court justifiably may refuse to agree to the choice. Thus, a trial court may, in certain situations, reject a defendant's choice of counsel on the ground of a potential conflict of interest, because a serious conflict may indeed destroy the integrity of the trial process. *United States v. Nichols*, supra, 841 F.2d 1503. Although not absolute, the constitutional right to counsel of one's choice does nevertheless mandate a presumption in favor of accepting a criminal defendant's choice of counsel. *Wheat v. United States*, 486 U.S. 153, 164, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); *United States v. Baker*, 10 F.3d 1374, 1399 (9th Cir. 1993), cert. denied, 513 U.S. 934, 115 S. Ct. 330, 130 L. Ed. 2d 289 (1994), overruled in part on other grounds, *United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000). This presumption means that a trial court may not reject a defendant's chosen counsel on the ground of a potential conflict of interest without a showing that both the likelihood and the dimensions of the feared conflict are substantial. *State v. Crespo*, 246 Conn. 665, 696-97, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999).

Moreover, mere speculation as to a conflict will not suffice. The trial court must examine whether the concern is substantiated and whether that concern outweighs the defendant's right to counsel of his choosing. *Wheat v. United States*, supra, 486 U.S. 164 (actual conflict or showing of serious potential for conflict required). Indeed, "[i]f by merely announcing his intention to call opposing counsel as a witness an adversary could thereby orchestrate that counsel's disqualification under the Disciplinary Rules, such a device might often be employed as a purely tactical maneuver. Clearly, however, these Rules were not designed to be used as tools of litigation strategy. Therefore, whenever an adversary declares his intent to call opposing

counsel as a witness, prior to ordering disqualification of counsel, the court should determine whether counsel's testimony is, in fact, genuinely needed. *Connell v. Clairol, Inc.*, 440 F. Supp. 17, 18 n.1 (N.D. Ga. 1977)." (Internal quotation marks omitted.) *Atlantic Richfield Co. v. Canaan Oil Co.*, 202 Conn. 234, 248-49, 520 A.2d 1008 (1987), overruled on other grounds, *Santopietro v. New Haven*, 239 Conn. 207, 213, 682 A.2d 106 (1996).

When either side in a criminal case seeks to call as a witness either a prosecutor or a defense attorney who is or has been professionally involved in the case, that party must demonstrate that the testimony is "necessary and not merely relevant, and that all other available sources of comparably probative evidence have been exhausted." *Ullmann v. State*, 230 Conn. 698, 717, 647 A.2d 324 (1994). This "compelling need" test strikes the appropriate balance between, on the one hand, the need for information and, on the other hand, the potential adverse effects on the attorney-client relationship and the judicial process in general. Id., 717-20.

Furthermore, we note that the trial court's decision as to whether a serious potential conflict justifies the disqualification of a defendant's chosen counsel is entitled to deference on appeal. In *Wheat v. United States*, supra, 486 U.S. 163, the United States Supreme Court noted that "the [trial] court must be allowed substantial latitude in refusing waivers of conflicts of interest . . . ." The court also noted that the "[trial] court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pretrial context when relationships between parties are seen through a glass, darkly." Id., 162. In his dissent, in which he reiterated a point made by the *Wheat* majority, Justice Marshall cautioned, however, that "the trial court must recognize a

presumption in favor of a defendant's counsel of choice. This presumption means that a trial court may not reject a defendant's chosen counsel on the ground of a potential conflict of interest absent a showing that both the likelihood and the dimensions of the feared conflict are substantial. Unsupported or dubious speculation as to a conflict will not suffice. The Government must show a substantial potential for the kind of conflict that would undermine the fairness of the trial process. In these respects, I do not believe my position differs significantly, if at all, from that expressed in the opinion of the Court." Id., 166 (Marshall, J., dissenting).

To overcome the presumption in favor of a defendant's choice of counsel, a disqualification decision by the trial court must, therefore, be based upon "a reasoned determination on the basis of a fully prepared record . . . ." *Fuller v. Diesslin*, 868 F.2d 604, 609 n.4 (3d Cir.), cert. denied sub nom. *Perretti v. Fuller*, 493 U.S. 873, 110 S. Ct. 203, 107 L. Ed. 2d 156 (1989). Because the interest at stake is nothing less than a criminal defendant's sixth amendment right to counsel of his choice, the trial court cannot vitiate this right without first scrutinizing closely the basis for the claim. Only in this way can a criminal defendant's right to counsel of his choice be appropriately protected.

Finally, it is well settled that if the decision by a trial court deprived a defendant of his constitutional right to counsel of choice, prejudice will be presumed. *Flanagan v. United States*, 465 U.S. 259, 268, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984) ("[o]btaining reversal for violation of [right to counsel of one's choice] does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding"); *United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir. 1986) ("denial of a criminal defendant's qualified right to retain counsel of his choice is

reversible error regardless [of] whether prejudice is shown"); *State v. Mebane*, 204 Conn. 585, 595, 529 A.2d 680 (1987), cert. denied, 484 U.S. 1046, 108 S. Ct. 784, 98 L. Ed. 2d 870 (1988) ("a per se rule of automatic reversal . . . properly vindicates the denial of the defendant's fundamental constitutional right to assistance of counsel guaranteed by the sixth amendment"). Therefore, if the trial court in the present case improperly disqualified Mastronardi, the appropriate remedy is to reverse the judgment of conviction and grant the defendant a new trial with his counsel of choice.

On the basis of the trial court record before us, we conclude that the state failed to demonstrate a compelling need for Mastronardi's testimony. First, because Brown was mentioned by name in both the arrest warrant affidavit and the second substitute information filed in court on January 20, 1998, it is undisputed that his identity as a potential witness and as a victim was known nearly one year before his murder. Second, the notice of service of disclosure of December 23, 1998, filed by the state, constituted a public record that memorialized the release of all of the witnesses' statements to Mastronardi pursuant to the trial court's December 9, 1998 discovery order. Indeed, as Satti's testimony demonstrated, Mastronardi was not the exclusive source of the fact that statements had been disclosed to him. Accordingly, the state never provided the court with specific information that *only* Mastronardi could provide.[10]

To the contrary, the state's attorney acknowledged that, "perhaps the state can develop the information it wants to develop through some other avenue. That may well be. I don't

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[10]Because the state never provided the court with the specific information that it wanted to elicit from Mastronardi, the possibility of an attempt to resolve the issue by Mastronardi providing a stipulation would have been illusory.

know that it is in fact true at this time. But that does not mean the state would then be restricted and deprived of giving Mr. Mastronardi's evidence as well." Necessity, not mere relevance, however, is the touchstone.

At oral argument before this court, however, the state advanced a new theory in support of the trial court's order disqualifying Mastronardi. In specific, the state contended that, prior to December 23, 1998, the defendant did not know that Brown would be an actual witness against him because he believed that a witness was someone who had given a statement to the police and the defendant did not know that Brown had done so until on or about December 23, 1998. In the warrant for the defendant's arrest, the police officer's affidavit recited that, after the drive-by shooting involving Snead, "[b]oth children were traumatized and were unwilling to talk about the incident." Therefore, according to the state, Mastronardi's testimony was needed to establish that the defendant learned of Brown's statement on or about December 23, 1998, thereby allowing the jury to infer that the defendant was responsible for the deaths of Brown and Clarke on January 7, 1999.

As we previously noted, however, the state never argued to the trial court that Mastronardi's testimony was necessary because only he could testify that he had given the defendant any witness statements or that he had shared their contents with the defendant. Moreover, even when given the opportunity to question Mastronardi, the state never asked him about what, if anything, he did in connection with any of the statements he had been given pursuant to the court order. See footnote 7 of this opinion. As a result, like Satti, Mastronardi merely related the terms of the trial court's discovery order, confirming that he was permitted to discuss the contents of any statements with the defendant, but not to disclose the identity of the authors of two of the statements. In fact, the only questions the state asked

Mastronardi pertained to the unusual nature of the court order and whether he ever had violated an order of the court, to which he responded in the negative.[11] Under the particular circumstances of this case, because the state did not demonstrate the compelling need for Mastronardi's testimony; see *Ullmann v. State*, supra, 230 Conn. 717; the appropriate remedy for this court is to order a new trial. *State v. Mebane*, supra, 204 Conn. 595.

The judgment is reversed and the case is remanded for a new trial.

In this opinion BORDEN, NORCOTT and PALMER, Js., concurred.

ZARELLA, J., dissenting. The majority concludes that "the record did not demonstrate that the state had met its burden of proving that [the testimony of one of the defendant's attorneys, Gary Mastronardi] was necessary." The majority therefore concludes that "the trial court improperly disqualified Mastronardi in violation of the defendant's constitutional right to counsel of his choice." I disagree with the majority and, therefore, dissent.[1]

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[11]The dissent's argument distills to its determination that, as the state asserts, the trial court reasonably could have found that the state had a compelling need to call Mastronardi as a witness to establish whether he had supplied the defendant with information in violation of an explicit court order. For all the reasons that we already have enumerated, we simply disagree.

[1]Because I conclude that the trial court did not abuse its discretion in granting the state's motion to disqualify Mastronardi, I need not reach the issue of whether the violation of a defendant's qualified right to counsel of choice is per se prejudicial, thereby requiring automatic reversal of that defendant's conviction. I feel compelled to note, however, that, contrary to the majority's assertion, the issue of whether the violation of a defendant's qualified right to counsel of choice requires automatic reversal is not well

settled. Rather, as a federal appellate court has noted in a case that the majority cites in support of its assertion that prejudice is to be presumed when a defendant is deprived of his constitutional right to retained counsel, the United States Supreme Court has yet to rule on whether the denial of this qualified constitutional right is "structural" and, thus, impervious to harmless error analysis. See *United States v. Washington*, 797 F.2d 1461, 1467 n.7 (9th Cir. 1986).

Moreover, at least one federal circuit court of appeals has rejected this rule of automatic reversal; that court has concluded that, in order to obtain a new trial, a defendant who improperly has been denied the right to counsel of choice must demonstrate prejudice. *United States v. Turk*, 870 F.2d 1304, 1308 (7th Cir. 1989); cf. *United States v. Voigt*, 89 F.3d 1050, 1074 (3d Cir.), cert. denied, 519 U.S. 1047, 117 S. Ct. 623, 136 L. Ed. 2d 546 (1996) ("nonarbitrary, but erroneous, denial" of right to counsel of choice may be subject to harmless error analysis [internal quotation marks omitted]).

Although I need not reach this issue, I do maintain that, contrary to the suggestion of the majority, the issue of whether the denial of a defendant's right to retained counsel is per se prejudicial or subject to harmless error analysis is far from clear and deserves a more comprehensive appraisal than that which the majority has provided. As Richard A. Posner, former chief judge of the Seventh Circuit Court of Appeals recently has noted: "That denying the counsel of one's choice falls into either category [namely, a structural error requiring automatic reversal or a nonstructural error lending itself to harmless error analysis] is not an easy position to maintain . . . after . . . *Turk* . . . which says that proof of prejudice is required in a case in which the defendant is complaining of such a denial. . . . Most cases hold [to] the contrary, however, such as *United States v. Rankin*, 779 F.2d 956, 960-61 (3d Cir. 1986), which relies on *Flanagan v. United States*, 465 U.S. 259, 267-68, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984)--not cited in *Turk*--[in which] the [United States] Supreme Court intimated that obtaining a reversal of a conviction because of the denial of the defendant's right to a lawyer of his choice does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding. A number of cases line up with *Rankin*. . . .

"The language . . . from *Flanagan* suggests that the right to counsel of one's choice falls into the . . . subcategory of structural errors that we have identified. Subsequent cases, however, of which the most recent is *Neder v. United States*, [527 U.S. 1, 8-9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)], contain language that, consistent with the limited and qualified nature of the

As the majority correctly notes, the trial court's determination of whether an attorney should be disqualified on the basis of an actual conflict or serious potential for a conflict is subject to the highly deferential abuse of discretion standard of review. "The Superior Court has inherent and statutory authority to regulate the conduct of attorneys who are officers of the court. . . . In its execution of this duty, the Superior Court has broad discretionary power to determine whether an attorney should be disqualified for an alleged . . . conflict of interest. . . . In

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right to counsel of one's choice . . . seems to confine the rule of automatic reversal of denials of the right to assistance of counsel to cases of complete denial. . . . That a district [court] has . . . broad discretion to extinguish the right to counsel of one's choice for reasons of calendar control suggests that this right, which in any event no indigent criminal defendant has . . . is, like the right to effective assistance of counsel (a right whose vindication requires proof of prejudice . . . ), not so fundamental as the rights protected by the rule of automatic reversal.

"The strongest argument for bringing the right to counsel of one's choice under that [automatic reversal] rule is practical, and also resembles a part at least of the rationale for the first class of structural errors. Prejudice will not be provable unless the replacement counsel failed to render effective assistance, an independent constitutional violation, and so the right to the lawyer of one's choice will be empty because unenforceable--had the district [court] disqualified [defense counsel] because [defense counsel] parts his hair on the right side [the defendant] would have no remedy. But this argument is overstated in at least two respects. First, it will sometimes be possible to prove prejudice even though the replacement lawyer didn't render ineffective assistance. If he is inexperienced, or lacks some specialized knowledge that the defendant's original choice of lawyer had, it may be possible to show that even though his representation of the defendant was not ineffective it was substantially less likely to achieve acquittal. Second, and more important, mandamus is an available remedy when an abuse of discretion by the trial judge cannot effectively be remedied by appealing the final decision . . . for example an abuse of discretion in disqualifying a party's lawyer." (Citations omitted; internal quotation marks omitted.) *United States v. Santos*, 201 F.3d 953, 960-61 (7th Cir. 2000). Thus, in light of the unsettled nature of this issue and the shifting perspective of United States Supreme Court precedent, I believe that this issue deserves more attention than it has been given.

determining whether the Superior Court has abused its discretion in [ruling on] a motion to disqualify, this court must accord every reasonable presumption in favor of its decision. Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Citations omitted.) *State* v. *Jones*, 180 Conn. 443, 448, 429 A.2d 936 (1980), overruled in part on other grounds, *State* v. *Powell*, 186 Conn. 547, 555, 442 A.2d 939, cert. denied sub nom. *Moeller* v. *Connecticut*, 459 U.S. 838, 103 S. Ct. 85, 74 L. Ed. 2d 80 (1982);[2] see also *State* v. *Webb*, 238 Conn. 389, 417, 680 A.2d 147 (1996); *Walton* v. *Commissioner of Correction*, 57 Conn. App. 511, 515, 749 A.2d 666, cert. denied, 254 Conn. 913, 759 A.2d 509 (2000); *Fiddelman* v. *Redmon*, 31 Conn. App. 201, 210, 623 A.2d 1064, cert. denied, 226 Conn. 915, 628 A.2d 986 (1993); 3 W. LaFave et al., Criminal Procedure (2d Ed. 1999) § 11.9 (c), p. 676 n.98 (listing federal cases applying same standard of review). Moreover, "[t]he ultimate issue is whether the trial court could reasonably have reached the conclusion that it did." *State* v. *Jennings*, 216 Conn. 647, 655, 583 A.2d 915 (1990). The high degree of deference afforded to the trial court's ruling is an important factor in reaching a decision on the issue presented.

The majority properly stresses that a criminal defendant

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[2] "In *State* v. *Powell*, [supra, 186 Conn. 555], this court overruled the implicit conclusion of the court in *State* v. *Jones*, supra, 180 Conn. 443, that the denial of a motion to disqualify is a final judgment subject to immediate appeal. Our decision in *Powell*, however, did not prompt us to modify our substantive holding concerning the conflict of interest issue in *Jones* and, moreover, we subsequently [adhered to] that holding in *State* v. *Jones*, 193 Conn. 70, 92, 475 A.2d 1087 (1984)." *State* v. *Webb*, 238 Conn. 389, 418-19 n.28, 680 A.2d 147 (1996).

has a qualified[3] constitutional right to be represented by counsel of choice. See, e.g., *Wheat* v. *United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988); see also 3 W. LaFave, supra, § 11.4 (c), pp. 557-58.[4] What the majority fails to emphasize, however, is that "the purpose of providing assistance of counsel is simply to ensure that criminal defendants receive a fair trial . . . and that in evaluating [s]ixth [a]mendment claims, the appropriate inquiry focuses on the adversarial process, *not on the accused's relationship with his lawyer as such*. . . . Thus,

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[3] A defendant's right to be represented by counsel of choice is a "qualified" right in the sense that it can be "circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the [g]overnment." Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

[4] The majority cites *State* v. *Crespo*, 246 Conn. 665, 696-97, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999), for the proposition that "a trial court may not reject a defendant's chosen counsel on the ground of a potential conflict of interest without a showing that both the likelihood and the dimensions of the feared conflict are substantial." I would conclude that the majority's reliance on *Crespo* is inapt. In that case, this court was called upon to determine whether the record presented facts sufficient to conclude that the trial court *should have known*, in the absence of an objection by either the state or the defendant, that a potential conflict existed, which would have given rise to a duty to inquire. See id., 694. In the present case, the issue is whether the trial court, *which was presented with information regarding a potential conflict*, properly concluded that such a potential conflict existed. As I indicate elsewhere in my dissenting opinion, I believe that the proper standard for determining whether the presumption favoring a defendant's right to counsel of choice is overcome is that articulated by the United States Supreme Court in *Wheat* v. *United States*, supra, 486 U.S. 164, namely, whether there is an actual conflict or "a serious potential for conflict."

while the right to select and [to] be represented by one's preferred attorney is comprehended by the [s]ixth [a]mendment, the essential aim of th[at] [a]mendment is to *guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.*" (Citations omitted; emphasis added; internal quotation marks omitted.) *Wheat* v. *United States*, supra, 159. Because the right to counsel of choice is a *qualified* constitutional right, the trial court "must recognize a presumption in favor of [the defendant's] counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but [also] by a showing of a serious potential for conflict." Id., 164; accord *United States* v. *Register*, 182 F.3d 820, 829 (11th Cir. 1999), cert. denied, 530 U.S. 1250, 120 S. Ct. 2703, 147 L. Ed. 2d 973 (2000); *United States* v. *Voigt*, 89 F.3d 1050, 1076 (3d Cir.), cert. denied, 519 U.S. 1047, 117 S. Ct. 623, 136 L. Ed. 2d 546 (1996); *Serra* v. *Michigan Dept. of Corrections*, 4 F.3d 1348, 1351 (6th Cir. 1993), cert. denied sub nom. *Serra* v. *Toombs*, 510 U.S. 1201, 114 S. Ct. 1317, 127 L. Ed. 2d 666 (1994); *United States* v. *Vasquez*, 995 F.2d 40, 42 (5th Cir. 1993); *United States* v. *Spears*, 965 F.2d 262, 274-75 (7th Cir. 1992).[5]

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[5] In the present case, the fact that the state's attorney intended to call Mastronardi to testify about his compliance or *noncompliance* with a court order--the latter of which possibly resulted in the murder of two witnesses--was relevant to the court's determination of a serious potential for conflict. Therefore, it is important to note that "[t]he conflict here is not the more usual one of multiple representation. . . . Rather, counsel has been placed in the position of having to worry about allegations of his own misconduct. . . . [W]hat could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities?" (Citations omitted; internal quotation marks omitted.) *United States* v. *Arrington*, 867 F.2d 122, 129 (2d Cir.), cert. denied sub nom. *Davis* v. *United States*, 493 U.S. 817, 110 S. Ct. 70, 107 L. Ed. 2d 37 (1989).

Moreover, as the state's attorney correctly pointed out at the hearing on the state's motion to disqualify, the decision to disqualify Mastronardi was

The majority relies on *Ullmann* v. *State*, 230 Conn. 698, 717, 647 A.2d 324 (1994), for its proposition that the state "must demonstrate [as a precondition to calling defense counsel as a witness] that [defense counsel's] testimony is necessary and not merely relevant, and that all other available sources of comparably probative evidence have been exhausted." (Internal quotation marks omitted.) *Ullman*, however, did not involve a defendant's sixth amendment right to counsel of choice. Rather, the issue in *Ullman* was whether the trial court had abused its discretion in ordering a public defender to testify for the state in a criminal trial against his former client. Id., 699-700, 715. My research has not revealed a single case in which a court has held that a party moving to disqualify counsel on the basis of an actual or potential conflict of interest must establish a compelling need.[6] I believe, however, that, qualified or not, a

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not one that could wait until trial had commenced. The state's attorney argued: "I'd submit this is not a conflict that can be resolved later on in the middle of a trial involving a death qualifying capital case. It's really something that has to be done up front right now. I submit that the risk that . . . Mastronardi will testify is great. In fact, it's almost a definite thing. . . . I'm representing the state of Connecticut as the state's attorney here in a serious case, a capital case. As an oppos[ing] . . . party, I think it would be completely inappropriate, unfair for me to be confronting as a witness and as an attorney in both categories one individual."

Inasmuch as the defendant was charged with multiple felony offenses, and, therefore, any disqualification of his attorney close to the commencement of or during trial would have prejudiced him in a correspondingly serious manner, it was critical that the decision to disqualify Mastronardi be made earlier rather than later. Moreover, I believe that the foregoing argument of the state's attorney indicates that there was no reason for the trial court to be concerned that the state's attorney was attempting to manufacture a conflict. See footnote 6 of this opinion.

[6] At least one federal circuit court of appeals has indicated, in the context of determining whether certain defendants were denied a fair trial when one of their defense counsel was called by the prosecutor as a witness, that the prosecutor must show that the information sought to be obtained from

defense counsel's testimony "is both necessary and unobtainable from other sources." *United States* v. *Crockett*, 506 F.2d 759, 760 (5th Cir.), cert. denied, 423 U.S. 824, 96 S. Ct. 37, 46 L. Ed. 2d 40 (1975). Another circuit court of appeals has noted, however, that that statement in *Crockett* is dictum. *United States* v. *Cortellesso*, 663 F.2d 361, 363 (1st Cir. 1981). I believe that the approach taken by the United States Circuit Court of Appeals for the First Circuit is the more sensible approach and properly balances the competing interests of the state, in its endeavor to put on its best case, and the defendant, who clearly has an interest in retaining counsel of his choice.

In *United States* v. *Cortellesso*, supra, 663 F.2d 361, the First Circuit was presented with a situation in which the prosecutor planned to call defense counsel as a witness to testify about a conversation in which he had engaged with government agents. Id., 362. The defendant claimed that the prosecutor should have been required to call the other participants in the conversation rather than defense counsel himself, citing *Crockett* for the proposition that if the information can be obtained from other sources, then the prosecutor cannot call defense counsel to testify. Id., 363. The court in *Cortellesso* disagreed, stating that "[t]he government was not required to accede to this truncation of its evidence. We do not accept the dictum in . . . *Crockett* . . . that the government must show that the evidence is unobtainable from other sources, if it means that the government must settle for less than its best evidence." (Internal quotation marks omitted.) Id. The court in *Cortellesso* seemed particularly concerned with the prospect of requiring the prosecutor to rely on sources other than defense counsel's testimony inasmuch as such reliance, under the circumstances, likely would have undermined the strength of the government's case. See id.

The First Circuit fleshed out this "best evidence" rule and its application in subsequent cases in which defense counsel had offered to stipulate to the information sought by the government. In *United States* v. *Diozzi*, 807 F.2d 10 (1st Cir. 1986), the court concluded that if defense counsel or a defendant offers to stipulate to the information sought by the government, and such information is independently verifiable and already in evidence--in that case, written statements made by the defendants through their attorneys--then such stipulation is equivalent to the government's best evidence. See id., 13. It is important to note that the court in *Diozzi* may have been troubled by the fact that the prosecutor in that case did not seek to disqualify defense counsel until six days before trial, which raises the specter of an attempt on the part of the prosecutor to manufacture a conflict. See *United States* v. *Defazio*, 899 F.2d 626, 632 (1st Cir. 1990); see also 3 W. LaFave, supra, § 11.9 (c), p. 677 n.103 ("Appellate courts have noted . . . that

defendant's constitutional right to counsel of his choice deserves due deference. Moreover, I believe that, in the present case, the state has demonstrated "that all other available sources of comparably probative evidence have been exhausted." Id., 717. Therefore, I will not quibble with the majority's assertion that the state must establish a compelling need for defense counsel's testimony.

In the present case, there were three sets of criminal

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to ensure against what *Wheat* described as government attempts to manufacture a conflict, the trial court should seek to determine whether the testimony of counsel is truly needed (in particular, whether the prosecution could establish the same facts through other means). . . . At the same time . . . the government should not be forced to settle for less than its best evidence." [Citations omitted; internal quotation marks omitted.]).

In *United States* v. *Defazio*, supra, 899 F.2d 632, the First Circuit again addressed the issue of whether a stipulation would amount to less than the government's best evidence. In that case, that court concluded that when the information sought by the government is not independently verifiable and is "only in the ken of [defense counsel] and the defendant"; id.; a stipulation amounts to less than the government's best evidence. Thus, it was proper for the district court to have disqualified defense counsel because he potentially could have been called to testify for the government. See id.

I would suggest that the foregoing cases set forth a more sensible approach than the "compelling need" test. In situations in which a stipulation is feasible, namely, when the information sought is independently verifiable, or when resort to other sources will not unduly undermine the strength of the government's case, the government should be required to use means other than defense counsel's testimony to bring the information it seeks before the fact finder. When the information sought, however, is within the knowledge of only defense counsel or defense counsel and the defendant, or when resort to other sources of the information will unduly undermine the strength of the government's case, the government should be allowed to call defense counsel as a witness. In any event, regardless of whether this court adopts the well reasoned "best evidence" approach or the more rigorous "compelling need" test, I believe that, in the present case, the state has sustained its burden of showing that Mastronardi was the only source available for the information that it had sought.

charges filed against the defendant, one for the attempted murder of Rudolph Snead, Jr., another for the murder of Snead and a third for the murders of Leroy Brown, whom the state had planned to call as a witness in the prosecution of the defendant for attempting to murder Snead, and Brown's mother, Karen Clarke. Mastronardi, whom the defendant privately retained as counsel, appeared on behalf of the defendant in connection with the attempted murder and murder charges in the "Snead" cases.[7] The state moved to consolidate the murder and attempted murder charges on July 27, 1998. That motion was granted on August 12, 1998. On June 3, 1999, the state filed a motion to disqualify Mastronardi. In its motion to disqualify, the state indicated that it had filed a motion to consolidate the two previously consolidated charges with the charges filed in connection with the double murder of Brown and Clarke. The state's motion to disqualify was granted on June 30, 1999. The motion to consolidate the double murder charges filed in the "Brown and Clarke" case and the attempted murder and murder charges filed in "Snead" cases was granted on August 6, 1999.[8]

At the hearing on the motion to disqualify, the state's attorney offered two reasons why Mastronardi's testimony was "necessary and not merely relevant"; (internal quotation marks omitted) id.; to the prosecution of the double murder charges. The first reason was that Mastronardi's testimony was necessary to demonstrate that, at some point before Brown had been

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[7] Frank Riccio, whom the defendant also retained as counsel, initially appeared on behalf of the defendant in the case involving the attempted murder of Snead. John Walkley appeared on the defendant's behalf as a special public defender in connection with the case involving the murders of Brown and Clarke.

[8] Subsequently, on August 16, 1999, the defendant's motion to sever the charges filed in "Snead" cases from the charges filed in the "Brown and Clarke" case was granted.

murdered, the defendant discovered that Brown was going to be called as a witness in connection with the state's prosecution of the defendant for the attempted murder of Snead. The second reason was that Mastronardi's testimony was necessary to show how the defendant obtained that information. The trial court thus was confronted with the possibility that Mastronardi would be called as a witness at the defendant's trial.

The record in this case reveals that the arrest warrant affidavit in the case involving the attempted murder of Snead contained the names, but not the addresses, of two children, namely, Brown and Tyree Snead, both of whom purportedly witnessed the defendant's unsuccessful attempt to kill Snead,. The record further reveals that Mastronardi was in possession of this information prior to the filing of any discovery requests. It is unknown whether the defendant learned of the names of these child eyewitnesses from the affidavit. The affidavit did state that "[b]oth children appeared traumatized and were *unwilling to talk about the incident*." (Emphasis added.) It is clear that the word "children" referred to Brown and Tyree Snead. Therefore, the only relevant information that the defendant could have possessed prior to the state's December 23, 1998 disclosure of a witness list, Brown's address and Brown's June 7, 1998 statement to the police, was Brown's name and the fact that he was unwilling to talk about the incident. It is also clear that, prior to December 23, 1998, the state had provided neither the defendant nor defense counsel with any information regarding the addresses of witnesses, the actual list of state witnesses or Brown's statement.

On December 23, 1998, the state disclosed to Mastronardi its witness list, Brown's address and Brown's statement to the police. On December 9, 1998, two weeks prior to the state's disclosure of this information, the trial court had issued a protective order prohibiting Mastronardi from disclosing

the names or addresses of witnesses, including Brown. Thus, it was at this point, for the first time, that the defendant had potential access to Brown's address, the fact that Brown had given a statement to the police, and the fact that the state would be calling Brown to testify against the defendant in connection with the attempted murder charge. Whether the defendant actually had learned of these facts depended *solely* upon whether Mastronardi had adhered to the dictates of the protective order. The state argued that this was a critical fact because, on January 7, 1999, approximately two weeks after the information was disclosed to Mastronardi, Brown and Clarke were murdered.

At the hearing on the motion to disqualify, Mastronardi confirmed that neither he nor his clients knew the address of Brown. It can reasonably be assumed that, in so stating, Mastronardi meant that he did not know Brown's address until the state had disclosed that address to him on December 23, 1998, especially in view of the fact that the court's protective order clearly prohibited Mastronardi from disclosing the addresses of the state's witnesses, including Brown. Mastronardi also confirmed that he did not receive Brown's statement or the witness list until they were disclosed, under protective order, on December 23, 1998.

The majority concludes that "the state never provided the court with specific information that *only* Mastronardi could provide." (Emphasis in original.) In addition, the majority declares that "the state never argued to the trial court that Mastronardi's testimony was necessary because only he could testify that he had given the defendant any witness statements or that he had shared their contents with the defendant. Moreover, even when given the opportunity to question Mastronardi, the state never asked him about what, if anything, he did in connection with any of the statements he had been given pursuant to the court order." I disagree.

Regardless of whether Mastronardi disclosed Brown's address to the defendant, *the fact* that Brown had given a statement to the police and that Brown would be testifying for the state was information that *only* Mastronardi could have provided to the defendant.[9] Moreover, while the defendant knew who Brown was and knew that he was riding in Snead's car when the defendant first attempted to murder Snead, only the state had knowledge of Brown's address and the fact that Brown had given a statement to police[10] prior to the state's disclosure of that information to Mastronardi on December 23, 1998. There was no evidence presented at the hearing on the motion to disqualify or otherwise to suggest that the source from which the defendant obtained this information was anyone other than Mastronardi or Brown himself, and the state clearly was unable to call Brown as a witness. Thus, it was necessary, if not critical, that the state inquire of Mastronardi whether he had violated the court's

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[9] The majority appears to conclude that, because there were other witnesses to testify that: (1) the information was not disclosed until two weeks before the murder of Brown and Clarke; (2) prior to disclosure to Mastronardi, the state had not disclosed this information to anyone else; and (3) Mastronardi was the only recipient of this information, the jury then could infer that Mastronardi may have been the source of the defendant's knowledge. Irrespective of the fact that the presiding judge would have been unlikely to allow the state to call into question the ethics of defense counsel at the defendant's trial, a requirement that the state prove its case by inference simply is not a sufficient basis on which to conclude that there did not exist a compelling need for Mastronardi's testimony. The state was entitled to call Mastronardi as a witness and ask him if he was, in fact, the source of the defendant's knowledge--a question that only Mastronardi and the defendant knew the answer to--and let his credibility be judged. Moreover, I would conclude that the state was entitled to put on its best evidence. See footnote 6 of this opinion.

[10] Of course, Brown, himself, and Clarke, Brown's mother, had knowledge of this information, but there is no indication that they did provide or had any incentive to provide this information to the defendant or any persons associated with the defendant.

protective order in order to establish the source of the defendant's information.

The state's attorney brought this matter to the attention of the trial court at the hearing on the motion to disqualify. At that hearing, the state's attorney informed the court that "[t]he testimony that [the defendant] was aware of where the victims lived . . . is extremely relevant and I'd submit that, therefore, whatever . . . Mastronardi had testified to or [will] be called to testify [to] on the homicides that he had passed on the information of the Earl Avenue address or, on the other hand, that he didn't. . . . I think what's more extremely important here and what the state certainly intends to pursue at length [at] trial is did [the defendant] know that . . . Brown was, in fact, to be a witness in the cases that were pending against him up to the date of January 7th of [1999, the date on which Brown was murdered]. And, secondly, how did [the defendant] know that . . . Brown was to be a witness, not merely the fact that [the defendant] may or may not have known that . . . Brown was present in an automobile at the time of the initial case here, which is one of the cases we're dealing with, which is the drive-by shooting [of] . . . Snead that did not result in a homicide. But the fact that the state indeed contemplated, planned and listed . . . Brown as an actual witness in the Snead shooting and homicide trials, the fact is the statement of . . . Brown and his listing as a witness in those cases w[ere] never disclosed or made know[n] to anybody until December 22nd or thereabouts when [C. Robert Satti, Jr., senior assistant state's attorney] filed a response to the [defendant's] discovery demand." The foregoing statements demonstrate that the state's attorney planned to call Mastronardi as a witness in the consolidated criminal trials to determine whether he had violated the court's December 9, 1998 protective order, a fact of which only

Mastronardi and the defendant had knowledge.[11]

At trial, the state's attorney questioned Mastronardi at length about the protective order issued in connection with state's disclosure of the witness list and Brown's statement. The state asked Mastronardi: "Have you ever, in your career, ever violated any court order that was placed on you?" The reference to "court order" clearly included the protective order at issue in this case. Mastronardi replied: "I would never violate an order of the court." While it may be true that the state's case would have been aided by an affirmative response to that question, the test is not whether Mastronardi's testimony ultimately bolsters the state's case, a determination that cannot be made without the benefit of hindsight, but, rather, whether there is a compelling need for that testimony. If Mastronardi had answered the question in the affirmative, that answer would have supported an inference that the defendant knew for the first time, on or after December 23, 1998, and shortly before Brown was murdered, that Brown lived on Earl Avenue and had given a statement to the police, and that the state was planning to call Brown to testify against the defendant at the defendant's trial. The fact that Mastronardi's

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[11] The majority makes much of the fact that the state's attorney informed the court at the hearing on the state's motion to disqualify that, "perhaps the state can develop the information it wants to develop through some other avenue. That may well be. I don't know that it is in fact true at this time." What the majority fails to mention, however, is that this statement was made in direct response to Mastronardi's incorrect assertion that the information sought by the state constituted uncontested matters, namely, that Mastronardi "never had [Brown's] address" and that Brown's statement was not disclosed to Mastronardi until December 23, 1998. The fact remains, however, that the knowledge of what Mastronardi did with the information when it was disclosed to him is knowledge that resided exclusively with Mastronardi. Indeed, the trial court fully appreciated that Mastronardi was the only source of this information. The court stated that "one of the core issues in the case is [what] knowledge [the defendant] had about . . . Brown's potential testimony and when and how he obtained that knowledge."

answer ultimately was not helpful to the state is irrelevant to the issue of whether there existed a serious potential for a conflict of interest that would have warranted Mastronardi's disqualification. Indeed, whether defense counsel *ultimately* testifies at trial is irrelevant because "we do not review the [trial court's] decision with the advantage of hindsight." *United States* v. *Defazio*, 899 F.2d 626, 631 (7th Cir. 1990).

Based on the foregoing, I would conclude that the state adequately had established that Mastronardi's testimony was "necessary and not merely relevant"; (internal quotation marks omitted) *Ullman* v. *State*, supra, 230 Conn. 717; and, consequently, there was a compelling need for Mastronardi's testimony at the defendant's trial. This compelling need for Mastronardi's testimony demonstrated a "serious potential for conflict"; *Wheat* v. *United States*, supra, 486 U.S. 164; sufficient to overcome the "presumption in favor of [the defendant's right to] counsel of choice . . . .". Id. Accordingly, I cannot conclude that the trial court abused its discretion in granting the state's motion to disqualify Mastronardi and, therefore, I respectfully dissent.

**SUPREME COURT**

**STATE OF CONNECTICUT**

**NO. SC 16380**

**STATE OF CONNECTICUT**

**v.**

**RUSSELL PEELER : SEPTEMBER 25, 2003**

**ORDER**

THE MOTION OF THE STATE OF CONNECTICUT, FILED AUGUST 29, 2003, FOR RECONSIDERATION AND REARGUMENT EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D **DENIED.**

BY THE COURT,
/s/ Michele T. Angers

_____
CHIEF CLERK

NOTICE SENT: SEPTEMBER 26, 2003
HARRY WELLER, ASSISTANT STATE'S ATTORNEY
FAIRFIELD POST CONVICTION REMEDY UNIT
GLENN W. FALK, SPECIAL PUBLIC DEFENDER
HON. G. SARSFIELD FORD
CLERK, BRIDGEPORT SUPERIOR COURT, (CR97-0132912T), (CR98-0140050T)
RJD

087/031087

No. 03-1080

# In the Supreme Court of the United States

STATE OF CONNECTICUT,

*Petitioner*,

v.

RUSSELL PEELER,

*Respondent*

On Petition for Writ of Certiorari
to the Connecticut Supreme Court

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Consistent with the Sixth Amendment right to counsel of choice in a criminal prosecution, may a state rebut the presumption in favor of a defendant's chosen counsel and have defense counsel disqualified merely by stating that it might call defense counsel as a witness, without indicating the substance of the anticipated testimony and showing that such testimony is necessary to the state's case?

2. If defense counsel of choice is erroneously disqualified based on the state's asserted need to call defense counsel as a witness, and the state does not in fact call or need defense counsel as a witness at the ensuing trial, may the state properly claim that the Sixth Amendment deprivation was harmless?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

RESPONDENT'S BRIEF IN OPPOSITION ..... 1

STATEMENT ..... 1

REASONS FOR DENYING THE PETITION ..... 5

I. THE PETITIONER DID NOT CLAIM BELOW THAT THE STANDARD FOR CALLING DEFENSE COUNSEL AS A WITNESS WAS TOO HIGH. THE DECISION BELOW RESTED ON THE UNIQUE FACTS OF THIS CASE, NOT ON AN UNREASONABLY HIGH STANDARD INVOLVING A GENUINE CONFLICT OF AUTHORITY ..... 5

II. THIS COURT HAS ALREADY FURNISHED APPROPRIATE GUIDANCE TO THE LOWER COURTS ON THE SECONDARY ISSUE WHICH THE PETITIONER FAILED TO BRIEF BELOW. MOREOVER, APPLYING HARMLESS ERROR REVIEW TO ERRONEOUS DISQUALIFICATIONS OF COUNSEL OF CHOICE WOULD CREATE FURTHER INCENTIVES FOR THE MISUSE OF MOTIONS TO DISQUALIFY DEFENSE COUNSEL ..... 8

CONCLUSION ..... 12

TABLE OF AUTHORITIES

CASES Page

*Connell v. Clairol, Inc.*, 440 F. Supp. 17 (N.D.Ga. 1977) ..... 7

*Crandell v. Bunnell*, 144 F.3d 1213 (9th Cir. 1998), *overruled on other grounds* by *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000) ..... 10

*Flanagan v. United States*, 465 U.S. 259, 104 S.Ct. 1051, 79 L. Ed. 2d 288 (1984) ..... 8, 9, 10, 11

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*Lainfiesta v. Artuz*, 253 F.3d 151, 156-158 (2d Cir. 2001), *cert. denied sub nom. Lainfiesta v. Greiner*, 535 U.S. 1019 (2002) ..... 10

*State v. Arguelles*, 63 P.3d 731 (Utah 2003) ..... 11

*State v. Peeler*, 265 Conn. 460, 828 A.2d 1216 (2003) ..... *passim*

*Ullmann v. State*, 230 Conn. 698, 647 A. 2d 324 (1994) ..... 6, 7, 11

*United States v. Childress*, 58 F.3d 693 (D.C. Cir. 1995) *cert. denied* 516 U.S. 1098 (1996) .... 10

*United States v. Mendoza-Salgado*, 964 F.2d 993 (10th Cir. 1992) ..... 10

*United States v. Panzardi Alvarez*, 816 F.2d 813 (1st Cir. 1987) ..... 9

*United States v. Rankin*, 779 F. 2d 956 (3rd Cir. 1986) ..... 9

*United States v. Santos*, 201 F.3d 953 (7th Cir. 2000) ... 10

*United States v. Turk*, 870 F.2d 1304 (7th Cir. 1989) ..... 10

*United States v. Voigt*, 89 F.3d 1050 (3rd Cir.) ..... 11
*cert. denied*, 519 U.S. 1047 (1996)

*Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) ..... 8, 9

*Wilson v. Mintzes*, 761 F.2d 275 (6th Cir. 1985) ..... 9

## RESPONDENT'S BRIEF IN OPPOSITION

The respondent Russell Peeler respectfully requests that this Court deny the State of Connecticut's petition for writ of certiorari, seeking review of the Connecticut Supreme Court's decision in *State v. Peeler*, 265 Conn. 460, 828 A.2d 1216 (2003) (Pet. App. A-1 to A-35).

## STATEMENT

The Connecticut Supreme Court opinion sets forth in detail the facts and procedural history regarding the two cases underlying this appeal. 265 Conn. at 463 *et seq.*, Pet. App. at A-5 *et. seq.* In summary, the respondent Russell Peeler hired experienced criminal defense lawyer Gary Mastronardi to represent him in a case concerning the attempted murder and murder of Rudolph Snead in Bridgeport, Connecticut. As the case neared trial, the prosecutor's office moved to disqualify Attorney Mastronardi on the ground that the state might call him as a witness—not regarding the original charges against Peeler, but because of a supposed connection of Attorney Mastronardi to the subsequent murder of Leroy Brown, a potential witness in the Snead case, and his mother Karen Clarke. Leroy and his mother had moved to an undisclosed address on Earl Avenue in Bridgeport after giving statements to the police soon after the attempted murder of Snead. In a separate capital felony case, the state charged Peeler with the murder of these individuals at the Earl Avenue address. The respondent's appeal from his convictions in the Clarke/Brown trial is pending in the Connecticut Supreme Court.

It is important to note that Attorney Mastronardi never sought to represent Russell Peeler in the new case. A special public defender was appointed to represent the defendant in the Clarke/Brown murder trial. Although the state moved to consolidate the Snead case with the Clarke/Brown case, the

motion was only granted after Attorney Mastronardi had been removed from the Snead case for which he was hired. Shortly thereafter, the cases were severed and went to trial separately. In the Snead case, after Attorney Mastronardi's removal, the trial court appointed a less-experienced special public defender to represent Peeler. The defendant was convicted on all counts and received a 105-year sentence of incarceration.

As the Connecticut Supreme Court opinion recounts, the state abandoned its original reason for needing Attorney Mastronardi as a witness. The state's original motion to disqualify him provided that "[i]t is expected that Attorney Mastronardi will be called as a witness in the [capital felony case] regarding any knowledge on his part regarding the address and location of Karen Clarke and Leroy Brown, Jr. Attorney Mastronardi has spoken to the press and to Judge Ronan regarding a [s]tate's [o]bjection to disclosure of the above [witnesses'] address and statements claiming that he or his client had knowledge of their address before the [s]tate's motion [for a protective order]." 265 Conn. at 465, Pet. App. at A-7.

At the hearing regarding the state's motion to disqualify defense counsel, Attorney Mastronardi advised the court that "Mr. Satti, who is the prosecutor who's handling [the capital felony] case, knows full well that I never had the Earl Avenue address. . . . And Mr. Satti's words to me in court one day were: In light of all this, aren't you glad that the state never gave you the Earl Avenue address? . . . . Now I don't understand why Mr. Benedict would get up and even suggest something like that in open court on the record when he knows that's not true. I never knew that these people lived on Earl Avenue until I read it in the newspaper and that is an established fact. That's not—Mr. Satti could be called as a witness to establish that. Do we disqualify the state's attorney's office in this case?" 265 Conn. at 465-66, Pet. App. at A-7.

The state then switched gears. State's Attorney Benedict argued: "So it's not so much evidence that the state would seek to offer as to the defendant's knowing where they live, but rather what is necessary and most relevant in the double homicide trial is the confirmation that Leroy Brown would indeed be a witness. That in fact is the focal point of the state's evidence as to motive in the double homicide. I'd submit that the argument that the December [1998] disclosure triggered the January [1999] murders is most compelling and that therefore Mr. Mastronardi's testimony in the trial of the double homicide will be most necessary and will not be uncontested." 265 Conn. at 466, Pet. App. at A-8.

In response, Attorney Mastronardi argued that his own testimony was not necessary to make the state's point before a jury that Leroy Brown was a potential witness, thereby furnishing a motive for his murder by Russell Peeler. Attorney Mastronardi argued that the disclosure of the Brown and Clarke statements to the defense in December, 1998 was a matter of public record. Moreover, at an earlier hearing on the state's motion for a protective order in October, 1998, Attorney Mastronardi had stated on the record that he and his client already knew the identity of the witnesses the state sought to protect, including Leroy Brown. 265 Conn. at 466-67, Pet. App. at A-8 to A-9.

At the disqualification hearing, State's Attorney Benedict conceded that "perhaps the state can develop the information it wants to develop through some other avenue. That may well be. I don't know that it is in fact true at this time. . . ." 265 Conn. at 467, Pet. App. at A-8.

Later, in an interview with a newspaper, Benedict suggested that the disclosure of the statements of Leroy Brown and his mother had not led to their deaths. According to the newspaper account, Benedict said: "One thing you've got to understand . . . everybody knew everybody. . . . [T]he defense

knew their identities even before coming to court." 265 Conn. at 467-68, Pet. App. at A-9. Indeed, at the Clarke/Brown murder trial, the state's theory of the case was not that Attorney Mastronardi had told his client the names of the witnesses and where to find them. Rather, the defendant already knew their identities, and through a chance encounter, discovered their new address on Earl Avenue. The state developed this evidence through relatives and acquaintances of the defendant, not Attorney Mastronardi.

Attorney Mastronardi was not called as a witness at the Snead trial, the subject of this appeal. Even at the second trial for which the defendant always had other counsel, Attorney Mastronardi's contribution as a witness was negligible. The petitioner called State's Attorney Satti to testify about the limited disclosure of the witness statements to Attorney Mastronardi. The state then called Attorney Mastronardi as a witness regarding the same disclosure order, but never questioned him about what, if anything, he in fact had done in connection with the statements. 265 Conn. at 468-69, Pet. App. at A-10 to A-11.

The Connecticut Supreme Court ruled: "We agree with the defendant that the record did not demonstrate that the state had met its burden of proving that Mastronardi's testimony was necessary. Accordingly, we conclude that the trial court improperly disqualified Mastronardi in violation of the defendant's right to counsel of his choice." 265 Conn. at 470, Pet. App. at A-11 to A-12 (footnotes omitted).

The Court elaborated on its conclusion that Mastronardi's testimony was not needed by the state: "First, because Brown was mentioned by name in both the arrest warrant affidavit and the second substitute information filed in court on January 20, 1998, it is undisputed that his identity as a potential witness and as a victim was known nearly one year before the murder. Second, the notice of service of

disclosure of December 23, 1998, filed by the state, constituted a public record that memorialized the release of all of the witnesses' statements to Mastronardi pursuant to the trial court's December 9, 1998 discovery order. Indeed, as Satti's testimony demonstrated, Mastronardi was not the sole source of the fact that statements had been disclosed to him. Accordingly, the state never provided the court with specific information that *only* Mastronardi could provide." 265 Conn. at 476, Pet. App. at A-18.

## REASONS FOR DENYING THE PETITION

### I. THE PETITIONER DID NOT CLAIM BELOW THAT THE STANDARD FOR CALLING DEFENSE COUNSEL AS A WITNESS WAS TOO HIGH. THE DECISION BELOW RESTED ON THE UNIQUE FACTS OF THIS CASE, NOT ON AN UNREASONABLY HIGH STANDARD INVOLVING A GENUINE CONFLICT OF AUTHORITY.

As acknowledged in both the majority and dissenting opinions below, the state's case did not rise or fall on the legal standard cited in the petition for certiorari. The one dissenting justice wrote: "I believe that, in the present case, the state has demonstrated 'that all other available sources of comparably probative evidence have been exhausted.' . . . Therefore, I will not quibble with the majority's assertion that the state must establish a compelling need for defense counsel's testimony." 265 Conn. at 485-86, Pet. App. at A-28.

The majority opinion confirms the fact-dependent nature of the ruling below: "The dissent's argument distills to its determination that, as the state asserts, the trial court reasonably could have found that the state had a compelling need to call Mastronardi as a witness . . . For all the reasons we have already enumerated, we simply disagree." 265 Conn. at 478 n. 11, Pet. App. at A-20 n. 11.

The petitioner did not urge the Connecticut Supreme Court to set a lower threshold for calling defense counsel as a witness. Rather, the state claimed that it had met the test for calling Attorney Mastronardi to the stand and therefore he had to be disqualified. There was no sharp disagreement on legal principle reflecting a serious conflict among the federal circuit or state supreme courts.

The petitioner lost below because it could not support its original suggestion that Attorney Mastronardi had given his client the Earl Avenue address where the boy and his mother were killed, not because of an unreasonably high standard for disqualifying defense counsel. The suggested scenario might have made Attorney Mastronardi an important witness for the state in the Brown/Clarke murder trial, but even then he could have remained as counsel of choice in the Snead trial. The petitioner's alternative basis for disqualifying Attorney Mastronardi, namely that only he could establish a motive for Peeler to have murdered Brown and Clarke by showing that Brown was to be a witness against Peeler, was similarly wide of the mark. As the Connecticut Supreme Court concluded, there were a variety of different ways to show the Brown/Clarke jury that Brown was a potential witness against the defendant. Attorney Mastronardi was not needed to make the state's case against Peeler in the Brown/Clarke trial, let alone the Snead trial.

Notwithstanding these dispositive factual matters, the state seeks to carry the battle to a higher forum on the back of the standard adopted by the Connecticut Supreme Court for allowing one party to call the other party's lawyer to the stand. This is a curious tack for the state to take, for in its brief below and at oral argument before the Connecticut Supreme Court, the petitioner urged the Court to apply *Ullmann v. State*, 230 Conn. 698, 647 A. 2d 324 (1994), to the facts of this case. In *Ullmann*, the Connecticut Supreme Court held that the state had demonstrated a sufficient need, based

on specific proposed questions and anticipated answers, to call the defendant's former public defender as a witness against him. The state argued that *Ullmann* was indistinguishable from the present case. A subsection of the state's brief before the Connecticut Supreme Court was entitled, "Why The Facts Of This Case Are The Same As *Ullmann*." Brief of the State of Connecticut-Appellee, at 15. Now, the state complains for the first time that the *Ullmann* standard was too high.

In the present case, the Connecticut Supreme Court summarized the rationale for its *Ullmann* standard as follows: "When either side in a criminal case seeks to call as a witness either a prosecutor or a defense attorney who is or has been professionally involved in the case, that party must demonstrate that the testimony is 'necessary and not merely relevant, and that all other available sources of comparably probative evidence have been exhausted.' . . . This 'compelling need' test strikes the appropriate balance between, on the one hand, the need for information and, on the other hand, the potential adverse effects on the attorney-client relationship and the judicial process in general." 265 Conn. at 460, Pet. App. at A-16 (quoting *Ullmann*, 230 Conn. at 717, 647 A.2d at 333).

Recognizing the potential for abuse in calling an opposing lawyer to the stand, the Connecticut Supreme Court endorsed the rule that "whenever an adversary declares his intent to call opposing counsel as a witness, prior to ordering disqualification of counsel, the court should determine whether counsel's testimony is, in fact, genuinely needed. *Connell v. Clairol, Inc.*, 440 F. Supp. 17, 18 n.1 (N.D.Ga. 1977)." 265 Conn. at 474, Pet. App. at A-15 to A-16.

This standard for calling defense counsel as a witness, whether denominated a "compelling need," "genuine need," or "necessary and not merely relevant" test, appropriately informed the Connecticut Supreme Court's determination of

whether Attorney Mastronardi had been properly disqualified at the state's behest, based on a suggested conflict of interest from the possibility of his serving as counsel and witness in the same trial. The Connecticut Supreme Court nevertheless recognized that under *Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) and other cases, the right of a defendant to choose defense counsel is not absolute, but must yield when an actual conflict of interest or a "serious potential" for a conflict is shown. *Peeler*, 265 Conn. at 473-74, Pet. App. at A-14 to A-15.

Thus this case does not implicate any real split of authority. There was nothing exceptional or aberrant in the Connecticut Supreme Court's use of the standard at issue until the Court disagreed with the petitioner's view of the facts. The petitioner has identified no case reaching a different result where the facts are analogous to those here. In short, the petitioner has failed to show that this fact-based case, where the "compelling need" standard was not originally in dispute, merits a place on the Court's docket.

## II. THIS COURT HAS ALREADY FURNISHED APPROPRIATE GUIDANCE TO THE LOWER COURTS ON THE SECONDARY ISSUE WHICH THE PETITIONER FAILED TO BRIEF BELOW. MOREOVER, APPLYING HARMLESS ERROR REVIEW TO ERRONEOUS DISQUALIFICATIONS OF COUNSEL OF CHOICE WOULD CREATE FURTHER INCENTIVES FOR THE MISUSE OF MOTIONS TO DISQUALIFY DEFENSE COUNSEL.

The petitioner failed to brief below the issue of harmlessness of the deprivation of counsel of choice which it now presents as a secondary claim for review. The state cited *Flanagan v. United States*, 465 U.S. 259, 104 S.Ct. 1051, 79 L. Ed. 2d 288 (1984), in its Connecticut Supreme Court brief, at 11, for another proposition. While this Court has not

definitively ruled on whether denial of defendant's counsel of choice requires a showing of prejudice for reversal, the *Flanagan* case has provided guidance on the issue to the lower courts. The petitioner now magnifies the dimensions of the controversy in the lower courts in order to obtain further review.

In *Flanagan*, this Court noted that "to the extent that an asserted right to counsel of choice is like, for example, the Sixth Amendment right to represent oneself . . . [o]btaining reversal for violation of such a right does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." 465 U.S. at 267-68. The Court explained that "[n]o showing of prejudice need be made to obtain reversal in these circumstances because prejudice to the defendant is presumed." 465 U.S. at 268.

Given the concern that an unscrupulous or overzealous prosecutor might call defense counsel as a witness unnecessarily, or "'manufacture' a conflict in order to prevent a defendant from having a particularly able defense counsel at his side," *Wheat*, 486 U.S. at 163, it would be unfair and unwise to permit the state to argue that defendant's replacement counsel was adequate, or worse, to have the defendant shoulder the burden of showing inadequacy. Such inquiries regarding the ineffectiveness of counsel are better left to habeas corpus proceedings.

The majority of circuits that have reached the issue have held that a party need not demonstrate prejudice in seeking to obtain reversal based on an erroneous denial of the right to counsel of choice. *See United States v. Panzardi Alvarez*, 816 F.2d 813, 818 (1st Cir. 1987) (relying on *Flanagan*); *United States v. Rankin*, 779 F. 2d 956, 960 (3rd Cir. 1986) (relying on *Flanagan*); *Wilson v. Mintzes*, 761 F.2d

275, 285-86 (6th Cir. 1985); *Crandell v. Bunnell*, 144 F.3d 1213, 1216 (9th Cir. 1998), *overruled on other grounds by Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000); *United States v. Childress*, 58 F.3d 693, 736 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1098 (1996); *cf. United States v. Mendoza-Salgado*, 964 F.2d 993, 1016 (10th Cir. 1992) (explaining that defendant need not show prejudice when trial courts interference with right to counsel of choice unreasonable or arbitrary); *see generally Johnstone v. Kelly*, 808 F.2d 214, 217 (2d Cir. 1986) (characterizing the language in *Flanagan*, 465 U.S. at 267-68, as strongly suggesting that denial of the Sixth Amendment right to self-representation can never be harmless error).

The petitioner relies on cases involving factual scenarios unrelated to the present matter, such as *United States v. Turk*, 870 F.2d 1304, 1307-8 (7th Cir. 1989), where a continuance to obtain other counsel was denied. A requirement that harm be shown from that sort of denial of counsel of choice may not be unreasonable, given some defendants' penchant for manufacturing delay. The courts' interest in calendar control is substantial. The dicta in *United States v. Santos*, 201 F.3d 953, 958-61 (7th Cir. 2000), similarly involved a continuance, not a motion to disqualify defense counsel generated by his adversary.

The state also cites *Lainfiesta v. Artuz*, 253 F.3d 151, 156-158 (2d Cir. 2001), *cert. denied sub nom. Lainfiesta v. Greiner*, 535 U.S. 1019 (2002), but that case involved the comparatively minimal deprivation by the trial court of the right of one of two defense lawyers to conduct a particular cross-examination.

Here, the state's own dubious actions led to the Sixth Amendment deprivation. The petitioner shifted from one insubstantial ground to another for disqualifying Attorney Mastronardi, a highly-regarded criminal defense lawyer, as the

time for trial drew near. The potential for a conflict of interest was remote. Attorney Mastronardi was not called as a witness in the Snead trial. The state pursued a different theory of the case at the Clarke/Brown trial. Attorney Mastronardi was not necessary there either. Had the state presented an adequate offer of proof as it did in *Ullmann* to demonstrate a real need for defense counsel's testimony, and had the trial court not acted arbitrarily at the state's behest without a fully-developed record, *see United States v. Voigt*, 89 F.3d 1050, 1074 (3d Cir.), *cert. denied*, 519 U.S. 1047 (1996), this case would be in an entirely different posture.

The issue which the state seeks to raise was most squarely addressed in *State v. Arguelles*, 63 P. 3d 731, 756 n. 23 (Utah 2003). There, however, the defendant sought the death penalty for himself. The appellate court held that the trial court's failure to consider the defendant's waiver of a conflict of interest was harmless, since the defendant would not have permitted the disqualified lawyer to present a defense in any event. In addition, the connection of the disqualified attorney to the matters to be tried was well-established. *Arguelles* does not demonstrate a widespread legal controversy crying for this Court's intervention.

In urging the adoption of a harmlessness test, the petitioner treats all defense counsel as essentially fungible. The respondent, who received a sentence of 105 years, does not see it that way. The misguided claim which the state advances so importunately now was one that it failed to brief below. Outside of dicta and inapposite factual scenarios, no significant difference of opinion exists in the lower courts.

The petitioner simply has not presented a strong rationale for revisiting the question of harm after *Flanagan*. A lesser standard will not adequately protect the Sixth Amendment right to counsel of choice against the temptation for prosecutors unnecessarily to call defense counsel as

witnesses. Even if the deprivation of counsel of choice is not viewed as "structural error" in all circumstances, the application of a harmless error test in situations like the present case would place an unfair burden on defendants and create a dangerous strategic incentive for prosecutors.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 03-1080

In The

# Supreme Court Of The United States

STATE OF CONNECTICUT,
*Petitioner,*

v.

RUSSELL PEELER,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

## REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. **DOES THE SIXTH AMENDMENT DEMAND PROOF OF A "COMPELLING NEED" FOR THE TESTIMONY OF DEFENSE COUNSEL BEFORE COUNSEL CAN BE DISQUALIFIED?**

II. **CAN THE ERRONEOUS DEPRIVATION OF COUNSEL OF CHOICE EVER BE HARMLESS?**

## TABLE OF CONTENTS

**PAGE**

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

I. THE SIXTH AMENDMENT DOES NOT DEMAND PROOF OF A "COMPELLING NEED" FOR THE TESTIMONY OF DEFENSE COUNSEL BEFORE COUNSEL CAN BE DISQUALIFIED ..... 1

A. The Result Below Arose From Use Of A Heightened Standard ..... 1

B. The Petitioner's Argument Below Addressed The First Question Presented .... 3

II. CAN THE ERRONEOUS DEPRIVATION OF COUNSEL OF CHOICE EVER BE HARMLESS? ..... 5

CONCLUSION ..... 8

## TABLE OF AUTHORITIES

**PAGE**

**CASES**

*Banks v. Dretke, 2004 U.S. LEXIS 1621 (2004)* . . . . . 7

*Flanagan v. United States, 465 U.S. 259 (1984)* . . . . . 5, 6, 8

*State v. Sanders, 534 S.E. 2d 696 (S.C. 2000)* . . . . . 2

*Ullmann v. State, 230 Conn. 698, 647 A. 2d 324 (1994)* . . . . 4

*Wheat v. United States, 486 U.S. 153 (1988)* . . . . . 1-4, 6-8

**CONSTITUTIONAL PROVISIONS**

Sixth Amendment to the United Stats Constitution . . 1-3, 6, 8

## I. THE SIXTH AMENDMENT DOES NOT DEMAND PROOF OF A "COMPELLING NEED" FOR THE TESTIMONY OF DEFENSE COUNSEL BEFORE COUNSEL CAN BE DISQUALIFIED

The Respondent opposes certiorari on this question for two reasons: A) The case below turned on the facts, not on the heightened standard defined by the "compelling need[s]" test, and B) the Petitioner "did not claim below that the standard for calling defense counsel was too high." *Respondent's Brief in Opposition at 5.* These claims are addressed seriatim.

### A. The Result Below Arose From Use Of A Heightened Standard

The Respondent argues that the "compelling need" test adopted by the Connecticut Supreme Court did not control the result. Rather he claims that the decision was fact driven. In other words, he argues that the Petitioner is really complaining about how the Connecticut Supreme Court characterized the events below.

The Respondent concedes, however, that the "compelling need" test adopted by the Court below sets a higher standard for disqualification than *Wheat v. United States, 486 U.S. 153, 164 (1988). Respondent's Brief in Opp. at 6* (Petitioner did not urge Court to "lower" threshold for calling defense counsel). With that point settled, that a debate existed about what to conclude from the facts is proof that the "compelling need" test affected the outcome.

The Respondent cites the following from the majority opinion below to stave off this Court's review: "'The dissent's argument distills to its determination that, as the state asserts, the trial court reasonably could have found that the state had a

compelling need to call Mastronardi as a witness . . For all the reasons we have already enumerated, *we simply disagree*.' Petitioner App. at A020 n 11."(Emphasis added by petitioner). *Respondent's Brief in Opposition at 5.*

Under *Wheat*, however, any disagreement should have prompted the Connecticut Supreme Court to defer to the trial court. "Viewing the situation as it did before trial . . .the fact that "[o]ther . . . courts might have reached differing or opposite conclusions with equal justification, . . .does not mean that one conclusion was `right' and the other was `wrong.'" *Wheat*. "The evaluation of the facts and circumstances of each case under this [broad discretionary] standard must be left primarily to the informed judgment of the trial court." *Id.*

Only by departing from *Wheat* and adopting the "compelling need" test was the Connecticut Supreme Court free to let its view of the facts override the trial court's pre-trial determination.

Contrary to what the Respondent claims, therefore, the test adopted by the majority below directly affected the outcome. It also created a Sixth Amendment rule that conflicts with a majority of the courts that have addressed the issue. Indeed, the Respondent acknowledged that a conflict exists on the disqualification issue because he argued as much to the Court below. *Defendant/Respondent's Brief Before the Connecticut Supreme Court pp 18-25.*[1]

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[1] The Respondent relied on *State v. Sanders, 534 S.E. 2d 696 (S.C. 2000); Respondent's Brief Before the Connecticut Supreme Court pp 20-21;* the only other jurisdiction that has raised the standard in conflict cases to requiring proof that counsel was a "necessary witness" before disqualification is justified. *State v. Sanders, 435 S.E. 2d at 698.*

Moreover, that conflict is most pronounced within the Second Circuit. As set forth in the petition, a Connecticut judge facing this issue has no effective discretion whatsoever because he or she can rarely, if ever, make the correct decision on whether to disqualify counsel. *Petition at 13-16.*

### B. The Petitioner's Argument Below Addressed The First Question Presented

In what is implicitly a default argument, the Respondent posits that the Petitioner never claimed that "the standard for calling defense counsel [as a witness] is too high." Although he is correct in what he says, his point is irrelevant.

On appeal, the Connecticut Supreme Court was asked to determine whether the pre-trial decision to disqualify counsel was reversible error because it violated the Respondent's Sixth Amendment right to counsel of choice. It was not asked to decide the standards a trial court had to apply when determining whether defense counsel could be compelled to testify against his former client.

The distinction between these two issues is vital. Under *Wheat* a trial court's ruling can be upheld even if the conflict is never realized because counsel is not called as a witness. *Wheat v. United States, 486 U.S. at 163.* Conversely, if counsel is actually called to testify, the conflict has matured. At that juncture other considerations about alternative sources of evidence can be evaluated to determine if said testimony is needed.

Based on the issue presented, therefore, the state relied on precedent holding that the trial court had "broad discretionary authority" that should not be overturned even if the reviewing

court would have reached a different conclusion. *Brief of the State of Connecticut at 11.* That is the *Wheat* test.

Nevertheless, due to the possibility that the "compelling need" test might be adopted, the Petitioner was obligated to argue that, even under that test, the trial court's ruling should be upheld. In this regard, despite the Respondent's criticism of its methodology, the Petitioner had good reason to rely on *Ullmann v. State, 230 Conn. 698, 647 A. 2d 324 (1994).*[2]

First, the Petitioner argued below that the "compelling need test" was met because, in both cases, the nature of the testimony sought and the circumstances of defense counsel's involvement were almost identical. Identical cases, using identical tests, should yield identical results.[3]

Second, within its argument, the Petitioner noted that the issue raised in this case was not identical to the issue in *Ullmann.* Thus, by analogy, if the facts of *Ullmann*, satisfied the "compelling need" test then, *a fortiori,* almost identical facts should certainly satisfy the less stringent, broad discretionary rule

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[2] The Respondent supports his claim that review should be denied by referencing the following subheading from the Petitioner's brief: "'Why The Facts Of This Case Are The Same As *Ullmann.*' Brief of the State of Connecticut -Appellee, at 15." Respondent Brief at 7.

[3] In both cases, the state disclosed something to defense counsel, defense counsel had contact with the defendant, and as a result a witness was jeopardized. In *Ullmann*, the criminal defendant merely made a telephone threat to the witness. *Ullmann v. State, 230 Conn. at 700-701, 647 A. 2d at 326.* The Connecticut Supreme Court found that the compelling need test was satisfied, in part, because "[i]t is significant that the testimony related to the charge of tampering with a witness, a crime that strikes at the heart of the integrity of our criminal justice system." *Id.* The Petitioner thought it reasonable to infer that if threatening a witness was "significant" in the equation, then murdering two witnesses would be more compelling.

to be applied to disqualification cases. Indeed, at oral argument before the Connecticut Supreme Court, the Petitioner made this very analogy. Transcript of Connecticut Supreme Court argument. App. at A2.

The Connecticut Supreme Court, at the Respondent's insistence, conflated the two legal issues and supplanted the broad discretionary authority granted to pre-trial disqualification with a new "compelling need" test. The Petitioner, however, never agreed to this standard and argued from the correct standard.

The Court below decided to both depart from the accepted standard for disqualifying counsel that was presented to it and ruled that this case did not satisfy the heightened standard adopted. Thus, the issue of the proper standard was considered and resolved and affected the outcome in the case.

## II. CAN THE ERRONEOUS DEPRIVATION OF COUNSEL OF CHOICE EVER BE HARMLESS?

The Respondent concedes that the issue of harmlessness has not been definitively ruled on by this Court. *Respondent's Brief in Opposition at 8-9.* His response provides some good reasons for granting review.

First, Respondent claims that the state did not discuss harmless error below. *Id. at 8.* In setting forth the standards for review, however, the Petitioner not only argued for broad discretion, but also cited *Flanagan v. United States, 465 U.S. 259, 269 (1984),* for the proposition that disqualification orders have to be reviewed after the trial is complete. Specifically, the Petitioner quoted that portion of *Flanagan* which states that part of the analysis includes "[t]he effect of the disqualification on the defense" and analogized this issue to speedy trial claims which

require proof of specific forms of prejudice.[4] *Id.*

The Respondent, however, never claimed that he was harmed, but rather that he was wronged and that harm should not be a factor. Thus, the Petitioner did not respond to a claim not raised. The Petitioner took the opportunity, however, to highlight for the Court below the evidence elicited at both this trial and the Brown/Clarke trial that positively linked the disclosure to the double-homicide.

At oral argument the Petitioner reiterated its claim that Mastronardi was a key witness, but even if there was a way to avoid having him testify the conflict that existed would "harm" the proceedings due to his link to the Respondent's crime. App. at A2-A6. In other words, the issue of harm arising from the conflict was a double-edged sword that is aligned along the two opposing Sixth Amendment rights–the right to counsel of choice and the right to conflict-free representation. The Petitioner illustrated that the conflict could have harmed the Respondent in a manner that some courts hold is *per se* reversible error, it could have prejudiced the Petitioner, and/or compromised the integrity of the criminal justice system. *Id.*

The Respondent also argues that the question left open in *Flanagan* should not be resolved in this case because the ruling below, eliminating a harmless error analysis, is an effective deterrent to prosecutorial misconduct. *Respondent's Brief in Opposition at 9, 11-12* (*per se* rule acts as a check on "an unscrupulous or overzealous prosecutor [who] might call defense counsel as a witness unnecessarily. or manufacture a conflict."). Although, in *Wheat*, this Court recognized that this is a valid

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[4] This language in *Flanagan* certainly suggests a harmless error analysis. Otherwise, the Court would have no reason to be concerned about how disqualification affected the defense.

concern, it left that issue to be resolved by the trial court exercising its broad discretion to decide whether counsel should be disqualified. *Wheat v. United States, 486 U.S. at 163.*

Thereafter, if, indeed, a defendant alleges prosecutorial misconduct, this Court favors Due Process as a vehicle for providing a remedy. *Banks v. Dretke, 2004 U.S. LEXIS 1621, 45-46 (2004).* Resolving a due process claim, however, requires proof of both misconduct and prejudice. *Id.* Thus, the specter of prosecutorial overreaching cannot exclude an analysis of harm without running afoul of this Court's jurisprudence on prosecutorial misconduct.

Finally, the Respondent states that "after Mastronardi's removal, the trial court appointed a less-experienced public defender to represent Peeler;" *Respondent's Brief in Opposition at 8-9. at 2;* and that "Mastronardi [was] a highly regarded criminal defense lawyer;" *Id. at 10.* Nothing in the record establishes which attorney was better qualified. Indeed, the record provides two insights into why the Respondent selected Mastronardi over another private attorney, Eugene Riccio, who represented him in the drive-by shooting case. The Respondent testified that he was told that Mastronardi was "just as good" as Riccio and offered him a more favorable payment plan. *Tr. 9/22/99 at 82-90.*

The only unique characteristic about Mastronardi's stature as defense counsel that finds support in this record is that, in an extremely high profile criminal event, the Respondent used him as a tool to plan a double homicide. Mastronardi was the only attorney in the entire State of Connecticut to carry that unwelcome burden.

## CONCLUSION

Both of the questions are worthy of this Court's review because of the conflicting jurisprudence that has developed since *Wheat* and *Flanagan*. Moreover, the issues arise in a case that holds that the Sixth Amendment right to counsel of choice protects the Respondent's abuse of that right.

Respectfully submitted,

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March, 2004

No. 03-1080

In The

# Supreme Court Of The United States

STATE OF CONNECTICUT,
*Petitioner,*

v.

RUSSELL PEELER,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

## APPENDIX

**APPENDIX**
**TABLE OF CONTENTS**

**PAGE**

Transcript Excerpt dated May 21, 2003 . . . . . A-1

* * * *

JUSTICE KATZ: What if–I'm looking at Mr. Benedict's argument in the course of this motion on A52 and he says: Perhaps the State can develop the information it wants to develop through some other avenue. That may well be. I don't know that, in fact, to be true at this time, but that doesn't mean the State would then be restricted and deprived of giving Mr. Mastronardi's evidence as well.

So, your argument is even if this could have been accomplished without Mr. Mastronardi, the State's entitled to do it its way.

MR. WELLER: No, Your Honor. That's not–what he says is looking perspectively. Your question is to look back retrospectively.

Perspectively, he's saying maybe. I don't know how the evidence is going to come in. I don't know what witnesses are going to testify to. I might be allowed to anyway.

Granted, he's making that argument but that's not why Mr. Mastronardi was disqualified. Judge Thim saw the connection as clear as day between what Mr. Mastronardi could provide that nobody else could, and, in fact, he was called as a witness, Your Honor.

JUSTICE KATZ: Well, I'm not sure how he saw it clear as day when I'm reading the argument and I've now got the benefit of 20-20 hindsight, so I guess I'm confused by your statement.

MR. WELLER: Well, read Judge Thim's decision. His two-line decision makes the connection. He connects the dots and turns out, with the benefit of 20-20 hindsight, that he was accurate, that Attorney Mastronardi was a witness.

He wasn't a witness in this case. They didn't go into great detail about the double homicide in this case, but this case

was only--they were joined after the disqualification, they were severed because of a Bruton issue; again, foreseeability.

Mr. Benedict didn't know about the Bruton issue until after the joinder, and after the joinder he brought it to the Trial Court's attention and the Bruton issue regarding the cases, the cases were separated, so, you know, as the cases go, and Mr. Mastronardi was on the State's witness list and was to be called as a witness.

From the State's position, this case is indistinct from Uhlman, utterly indistinct. It's the same premise of somebody using information gained from counsel for the purpose of going and eliminating a witness. Mr. Uhlman--it could have been the same type of stipulation in that case.

Maybe Mr. Uhlman wasn't willing to do it, but this Court ruled in Uhlman that he could be held in contempt for not answering the questions, that the State was entitled to extract that information from counsel despite the attorney-client relationship because it didn't touch on it.

If Mr. Uhlman can be held in contempt for that--Mr. Uhlman knew well enough to recuse himself. If he can be held in contempt for that when Mr. Mastronardi has the same information to offer, then he should be recused, and he was and it was proper exercise of the Court's discretion.

A lot of the questions that would go to--even looking back at it, Your Honor, Justice Katz, looking back on it, this case went down exactly the way it predicted, and Mr. Mastronardi's testimony was important in the scheme of things.

Maybe at the end of it when you look back and you say, gee, there's overwhelming evidence of guilt in both of these cases, but, certainly, you can't say that perspectively.

* * * *

*** MR. WELLER: But if they listened to the testimony of these people and after hearing that testimony they can confirm other aspects of it, the jury had a fair evaluation of who was at

risk here and who wasn't.

In the end, the defendant was not denied a fair trial. The defendant was given adequate counsel. He was given counsel under the proper circumstances.

If I can leave the Court with anything, it's that the understanding that the right to counsel is always trumped by the idea of the view of the system as being fair, and whenever counsel's participation compromises that, the right to counsel has to fall away, and that's what the Trial Court did here. It protected the integrity of the system.

Russell Peeler was not convicted in any case with a string of testimony that was crucially applied by an attorney who represented him at the time or was representing him in a trial, and that is the type of integrity that this Court should approve. It did so in Uhlman and it should do so again here.

This is a difficult case to try when witnesses are being killed one after the other.

These are very difficult cases to try, and to say, retrospectively, that, well, maybe the State could have gotten the evidence elsewhere is a fair question, but I think, when you're dealing with a trial court's discretion perspectively, the Court has to say yield to the trial court and yield to the system being run in a fair manner.

JUSTICE PALMER: Mr. Weller, I keep getting back to the stipulation. I just want to understand what your position is on that, clearly.

If Mastronardi had agreed to stipulate and he had, during a meeting with his client subsequent to his gaining permission to turn these over to his client, he had done that, he had visited his client and done that and that was the stipulation, nothing more, is it the State's view that it would have been improper for the Trial Court to have allowed that stipulation?

MR. WELLER: It would have been very dicey. It would

have been very dicey to draft the stipulation with the information that the State wanted, that the State wanted to pursue.

By the way, what the State learned, you know, as the testimony progressed in the second trial, it would have been a very dicey proposition. We'd probably be standing there arguing that now, and we'd be arguing a Crespo situation.

So, when you're talking about a trial court exercising its discretion, if it does it one way, it could be caught in a Crespo situation. If it does it the other way, it could violate counsel, the right to counsel.

That's where the trial court's discretion has to be yielded to, so if there would have been a stipulation, I think it would have--it's the State's opinion it would have been a very dicey proposition.

JUSTICE PALMER: I just don't understand why, exactly.

MR. WELLER: Because, Your Honor, you can't extract the attorney-client relationship from it.

Your Honor thinks--

JUSTICE PALMER: You can't extract--

MR. WELLER: --you can't extract the fact that this was a transaction between defendant and counsel.

JUSTICE PALMER: Well, if the stipulation said, I went to visit my client to meet with him and--

MR. WELLER: That's improper. The cases that talk about it say that the fact that the jury finds out that the information came by counsel who represents them, that's an impropriety. It's that very thing that makes it improper.

The stipulation cases talk about it was okay to stipulate when the stipulation could somehow say that a piece of evidence

arose without mentioning that counsel was involved in providing it.

JUSTICE PALMER: And a defendant cannot waive any difficulty with that.

MR. WELLER: No.

JUSTICE PALMER: The cases say that that kind of stipulation would so undermine public confidence in the system that we simply cannot permit it, and it trumps the right to counsel.

MR. WELLER: That, exactly, Your Honor.

At that point if that information is crucial and it's the only way to bring it out, then that's conflict-free representation that the defendant cannot waive and shouldn't be allowed to waive unless you want to set new standards.

JUSTICE PALMER: (Unclear)

MR. WELLER: And, Your Honor, by the way, when the stipulation occurred would also be important because the State needs the opportunity to know what it's going to ask Mr.
(transcript p. 32, 33)
Mastronardi.

I mean, it also asked Mr. Mastronardi whether, as a defense attorney, as Peeler's defense attorney, was this extraordinary to you?

Now, maybe that wasn't something that was crucial, but what would the State be willing to stipulate to that would be acceptable to it when it has the burden of proving guilt beyond a reasonable doubt?

That we don't know but if it was stipulating to what Your Honor expressly stated, from the case law that's been cited by

both parties that would have been improper.

If there's no further questions, Your Honors we'd ask that the convictions be affirmed. Thank you.